IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - x

BLAINE LAFLER, :

Petitioner :

v. : No. 10-209

ANTHONY COOPER :

- - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Monday, October 31, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN J. BURSCH, ESQ., Solicitor General, Lansing, Michigan; on behalf of Petitioner.

WILLIAM M. JAY, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting Petitioner.

VALERIE R. NEWMAN, ESQ., Assistant Defender, Detroit, Michigan; on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF PAGE

JOHN J. BURSCH, ESQ.

On behalf of the Petitioner 3

ORAL ARGUMENT OF

WILLIAM M. JAY, ESQ.

On behalf of United States, as amicus curiae, 18

supporting Petitioner

ORAL ARGUMENT OF

VALERIE R. NEWMAN, ESQ.

On behalf of the Respondent 28

REBUTTAL ARGUMENT OF

JOHN J. BURSCH, ESQ.

On behalf of the Petitioner 57

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 10-209, Lafler v. Cooper.

Mr. Bursch.

ORAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you, Mr. Chief Justice, and may it please the Court:

There are three points that I would like to press this morning regarding deficient plea advice. First, this Court has consistently limited the effective assistance right to ensuring the reliability of the proceedings where a defendant is adjudicated guilty and sentenced. Mere outcome is not the Strickland prejudice standard.

Second, when asserting an ineffective assistance claim the defendant --

JUSTICE KAGAN: Could I -- can I stop you on the first? You say mere outcome is not enough, reliability of the proceedings. How does that fit with Kimmelman, where we said it, the right to effective assistance, does attach to suppression hearings, obviously where evidence would not make the proceedings

more reliable?

MR. BURSCH: Justice Kagan, even in Kimmelman the Court remanded back to the lower courts to determine whether there was prejudice, and the obvious implication was that if there was no prejudice on the fairness of the adjudicatory proceeding itself, there would be no Sixth Amendment violation.

The second point that I wanted to press this morning was that when asserting an ineffective assistance claim, a defendant must show deprivation of a substantive or procedural right, and this Court has already held that a defendant has no right to a plea bargain.

Third, every possible remedy for deficient plea advice creates intractable problems demonstrating the --

JUSTICE SOTOMAYOR: Counsel, isn't there a right to make a critical decision on whether to accept or reject a plea bargain, once offered? There is no right to demand one or to keep it, but isn't there a right to make that kind of critical decision?

MR. BURSCH: Justice Sotomayor, the -- the not guilty plea is an assertion of the defendant's constitutional rights. It's invoking the right to trial that the Sixth Amendment contemplates. And so this

situation is really more like Fretwell. It's not a decision that you have, for example, whether to have a jury or not to have a jury, or whether to have this attorney appointed for your counsel or not, because in each of those cases you have an underlying substantive or procedural constitutional right; and have you no right to a plea. And so this fork in the road is really an illusory one, because you have no right to choose the other side of the fork.

JUSTICE KENNEDY: Suppose this were a death -- a death case, and roughly the -- the same facts, failure -- failure to communicate. And that leads me just to one other question that is based on your opening remarks. We can think about adjudication as having a constitutional violation, injury, and remedy. Are you saying that there was a violation in the abstract here but no injury, or was there a violation and an injury but just no remedy?

MR. BURSCH: I'm saying --

JUSTICE KENNEDY: So if you could do all of that, including the death penalty. I --

MR. BURSCH: Yes, I'm saying that there is no violation, because in order to prove a Sixth Amendment violation you have to demonstrate unreliability of the adjudicatory process. I am also

saying that there is no reasonable remedy, and I will talk about that in a minute.

With respect to the death penalty in particular, I would refer this Court right back to the Fretwell decision, because there, too, defendant and his counsel had an opportunity to raise a Collins objection that would have changed the sentence to avoid the death penalty in that case. Collins obviously was before habeas process, and this Court held that the defendant could not use the vehicle of an ineffective assistance claim to regain that lost opportunity because he had no constitutional right in it. And so really the remedy -- I'm sorry. The severity of the sentence doesn't enter the analysis once you have established that there has been no violation.

JUSTICE GINSBURG: When you say no violation, you don't mean that there was no ineffective assistance of counsel? I thought that was conceded, that there was ineffective assistance.

MR. BURSCH: That's correct, Justice Ginsburg. We have conceded for purposes of argument that there was ineffective assistance. But Strickland is a two-part test and, even after you get past the deficiency prong, there is still the question of whether this casts some doubt on the reliability of the

proceedings.

JUSTICE KAGAN: Well, I thought that the second part of the test asked about harm. And here the person is sitting in prison for three times as long as he would have been sitting in prison had he had effective assistance of counsel at the plea bargaining stage. So why doesn't that just meet the requirements of Strickland, both deficiency and prejudice?

MR. BURSCH: Well, that's actually the best argument that the Respondent has in this case. And the reason --

JUSTICE KAGAN: Sounds like a good argument.

MR. BURSCH: Well, the reason why it's wrong is because this Court has been very careful to define what that harm is. Specifically, the word was "outcome" in Cronic and Strickland.

JUSTICE KAGAN: And outcome -- there is a different outcome here. He is sitting in prison three times as long. That's a different outcome.

MR. BURSCH: Yes, but the Court went on to define outcome to mean reliability of the adjudicatory process. Specifically, the language was whether absent the deficiency the defendant -- I'm sorry -- absent the deficiency, the factfinder would have had a reasonable doubt respecting guilt. And what we have here is a

situation where everyone acknowledges --

JUSTICE KAGAN: Well, take the sentencing cases. The sentencing cases, the determination of guilt is over and the question is, is this person sitting in jail for one day longer because his counsel was ineffective? And if he is we would find prejudice there. So why isn't the same thing true here?

MR. BURSCH: Well, I don't believe it's quite that simple. If there was some legal error, an error to which he had a constitutional right, then certainly what you said is exactly true. But if you are talking about more or less days because of, for example, a judge thinking that the difference between crack and cocaine sentences was not appropriate or other things that are really up to the discretion of the trial court judge, Strickland says absolutely those things are not Sixth Amendment violations.

JUSTICE KAGAN: Well, I guess I don't understand that answer, because that answer seems to suggest that the assistance being provided was not ineffective. But here, as Justice Ginsburg notes, you've conceded that the assistance is ineffective. That assistance has led to a much, much, much longer sentence. As opposed to some of the sentencing cases suggest that 24 hours is enough, this is 10 years or

something; and that should be the end of the game, no?

MR. BURSCH: Well, let's try another sentencing hypothetical, where it's clear that there was deficient performance. Say that there is a local trial court judge and everyone knows that he has a certain predilection that if you like the local sports team he is going to give you a break. If the attorney comes in and he does not press the argument that this convicted defendant likes the local sports team, he gets a higher sentence. That's still not a Sixth Amendment violation.

Really, once you shift sentencing, the question is were you legally entitled to the result. And simply because he failed to appeal to the right discretionary tendencies of the trial court doesn't really make a difference. Here we are talking, obviously, about the guilt phase and it's much easier here because it says clearly in Strickland and Cronic and Kimmelman and many, many other cases that that outcome difference, the harm difference, has to be reliability of the process itself. It's a process --

JUSTICE SCALIA: You acknowledge, though, that it's ineffective assistance of counsel if you're -- well, no, I guess you haven't acknowledged. Let me ask you: Have you provided ineffective assistance of counsel if you are a lousy bargainer? You are just no

good at the -- you know; I don't know -- the game of bargaining. And so you do a bad job in bargaining down the sentence, I mean a notoriously bad job. Is that ineffective assistance of counsel?

MR. BURSCH: Under the Court's first prong of Strickland, you would have to look at whatever the standards of professional practice were and, depending how lousy the bargainer was, it could or could not be deficient. But the important thing is if it didn't have any effect on the subsequent trial and sentencing, then it would not be a Sixth Amendment violation.

JUSTICE SCALIA: Well, I don't even agree with the first part. I don't think our legal process is -- is a bargaining game. It shouldn't be.

MR. BURSCH: Well, we could agree with that. Bargaining is not what this is about, and that's why this Court has held in Weatherford and other cases that there is no right to the plea bargain itself. And that's really the second --

JUSTICE SOTOMAYOR: You can -- you can agree with that when 95 percent of the criminal cases are disposed of by way of bargaining?

MR. BURSCH: Because in the 95 percent of cases that are disposed of that way, this Court has already held in Padilla and Hill that there is a

constitutional right to have effective counsel when you accepting that plea. And the difference is when you are accepting a plea you're being convicted. That is the conviction. And this Court frequently establishes different tests when you are waiving a right, for example the right to go to trial, versus invoking a right, going to trial.

JUSTICE SOTOMAYOR: How can you talk about the reliability of a process or its fairness when you have an attorney who has fundamentally misgauged the law? How can a trial be fair when the attorney is going into a trial thinking his client can't be convicted because the shots fired hit below the waist? So how can that kind of trial ever be fair?

MR. BURSCH: Because there's no evidence here, not even a contention, that his belief had any impact whatsoever on the fairness of the trial proceeding. And this Court has drawn a bright-line rule at trial. If you look at the preliminary hearing, if there is attorney error there, deficiency --

JUSTICE KENNEDY: Well, but you skipped over a step. I think we do assume that the deficient advice led to the determination to plead not guilty.

MR. BURSCH: Right again, but that fork in the road is not one to which he has a constitutional

right.

JUSTICE KENNEDY: Well, but that's the question -- that's the question we're confronting. So I think --

MR. BURSCH: Well, I --

JUSTICE KENNEDY: -- your answer was a little too facile on that point. We have to assume there is ineffective assistance of counsel in advising the client the nature of the charge so that the client can make up his mind whether to plead guilty or not guilty. We have to assume that in this case, correct?

MR. BURSCH: Correct, we are assuming that. But what I would submit respectfully is that the plea stage isn't any different than a preliminary hearing or a line-up or a suppression hearing, where if there was some deficient attorney conduct this Court would still then look to see whether it had an adverse impact on the adjudication of guilt.

JUSTICE GINSBURG: Suppose the defective advice causes the defendant to enter a plea that he would not have entered if he had been properly advised. Can he get relief?

MR. BURSCH: Absolutely. Under Hill and Padilla, this Court has said when you give up your right to trial that's a very different situation and that

there is a remedy for that.

JUSTICE GINSBURG: So explain why defective advice causing a plea, that qualifies, but defective advice causing defendant to turn down a plea --

MR. BURSCH: It's just --

JUSTICE GINSBURG: -- does not?

MR. BURSCH: It's just like the difference between deciding to proceed with counsel, in which case there is no barrier to entry, or deciding to proceed without counsel, giving up the constitutional --

JUSTICE SCALIA: No, the difference -- that's not the difference at all. It seems to me the difference is when you plead guilty you deprive yourself of the 24-karat test of fairness, which is trial by jury before nine people who have to find you guilty beyond a reasonable doubt. When you plead guilty, you give up that.

When you don't plead guilty you get what is the best thing in our legal system. You can't do any better than that.

MR. BURSCH: Justice Scalia, you said it much more artfully, but that's exactly the point I was trying to make with Justice Ginsburg, that when you invoke your constitutional rights, your right to have an attorney, to go to a trial, to have a jury, we don't set

up barriers to entry. It's only when you give up those rights.

JUSTICE KAGAN: I take it, then, Mr. Bursch, you would have the same answer if the State had never provided counsel at all. So long as -- if the plea negotiations were all done between the prosecutor and the individual defendant, and the State refused to provide the individual defendant with counsel, but so long as the person in the end decided, oh, I don't like this plea, I'll go to trial, then it's all fine and dandy under the Sixth Amendment?

MR. BURSCH: That would be our position, because that's consistent with this Court's holding in Coleman and Wade and Kimmelman.

JUSTICE KENNEDY: And that would also be your position in a capital case?

MR. BURSCH: Yes. Under Fretwell this Court held definitively that so long as the reliability of the adjudicatory process and sentence were intact, that the deficient advice didn't affect it, that the severity of the punishment was not legally relevant.

JUSTICE SCALIA: So your position is you are entitled to effective assistance of counsel before you plead guilty, but you are not entitled to effective assistance of counsel in evaluating plea offers?

MR. BURSCH: I would say it slightly different --

JUSTICE SCALIA: All right.

MR. BURSCH: -- that you are entitled to effective counsel at every critical stage; however, it is not a Sixth Amendment violation unless it casts doubt on the reliability of the adjudication of guilt.

JUSTICE KENNEDY: That gets back to my question: Is it a violation in the abstract, damnum absque injuria?

MR. BURSCH: I'm sorry.

JUSTICE KENNEDY: Damage without injury.

MR. BURSCH: No, because under the Strickland and Cronic cases there is no damage, there's no Sixth Amendment violation, unless you can prove the prejudice.

JUSTICE ALITO: I mean, all of this is theoretically interesting and it may be that capital cases are sui generis here. But I thought the heart of your argument was that there just is no way to unscramble the eggs in this situation; there is no -- and that was your third point, I understood it --

MR. BURSCH: Correct.

JUSTICE ALITO: --there is no remedy that can put the parties back into the position where they

would have been had the error regarding the legal issue not occurred.

MR. BURSCH: That's exactly right. And let's talk about the two remedies that are most frequently bandied about in the circuit courts. First is to order a new trial. And to us it makes no sense to order a second trial after you have already had a first error-free trial.

In addition, you think about these habeas cases; if you are issuing a habeas writ and vacating a sentence 8 or 9 years after the fact, like you are here, essentially you are releasing the, defendant, because witnesses will die, they will move away, memories will be sparse, and so that's the natural effect of that. And in Cooper's brief, he doesn't even advocate for a second trial; he asks for specific performance. The problem with that is there you are infringing on the prosecutor's discretion, which is sacred, to say what his plea offer is going to be. And circumstances have changed once a trial has taken place.

CHIEF JUSTICE ROBERTS: "Sacred" is a little strong, don't you think? I mean, it is a, to some extent, unfair to the prosecutor because he knows already he's got a guilty verdict in his pocket and he has to go back. But why is it so terribly difficult to

tell the defendant he has a right to accept that offer if he wants, but then go through the normal process, which is it has to be approved by a judge and all that stuff? I don't see what's terribly difficult about that.

MR. BURSCH: We contend it violates the separation of powers. But you bring up an important point because circumstances have changed in two respects. The first is that you learn more information. So here, for example, the prosecutor learned that not only did Mr. Cooper shoot Kali Mundy, but he did it while she was screaming and running away from him. That's a changed circumstance. He might not give the same plea.

Even more so in Frye, where they learned that he was picked for another criminal violation after the plea was given, and the prosecutor testified that he would have taken the plea back when he knew that.

But the bigger changed circumstance is the trial itself, because the prosecutor has now gone through the risk of having an acquittal. He has also put, for example, the 8-year-old sexual abuse defendant on the stand, something he tried to avoid with the plea offer. And it truly is an egg that cannot be unscrambled.

And unless there are further questions, I will reserve of the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Jay.

ORAL ARGUMENT OF WILLIAM M. JAY

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. JAY: Mr. Chief Justice and may it please the Court:

Petitioner's convictions and sentence are reliable because the proceedings that produced them were reliable. And to collaterally attack his convictions or his sentence based on allegedly ineffective assistance of counsel, he has to show that the ineffective assistance of counsel prejudiced him. As this Court's Strickland cases have used that term, that means he has to show that a reviewing court should lack confidence in the proceeding that produced the convictions or the sentence.

JUSTICE BREYER: Well, you -- first, there is nothing about this in the Sixth Amendment, is there? I mean, the text of the Sixth Amendment talks about criminal prosecutions requiring the assistance of counsel for defense, period.

MR. JAY: The Sixth Amendment requires the

assistance --

JUSTICE BREYER: There is nothing in the Sixth Amendment that has these qualifications. I haven't seen anything in any case which was other than case specific. That is, this issue hasn't been decided before, not to my knowledge. The language can be taken out of those cases, as you have very properly done. And so there is nothing that I could find in the cases. There is nothing in the Sixth Amendment itself. In 95 percent of the cases, they do plead guilty. And what's the problem about ordering the prosecution to simply repeat the offer he gave before?

Well, I mean, I don't really see if there -- And prejudice? Well, if a person's been executed, if he had gotten the -- if he had gotten the plea offer, he would have pled guilty for 50 years in jail, okay? That's my imaginary case. I can think of one where there's prejudice. He's dead. All right. So what's the answer in my imaginary case, if it's not in the amendment, not a holding, etc.?

MR. JAY: Well, I think that -- Let me address that capital hypothetical that has come up several times. And I think that it's instructive, Justice Breyer, to look at this Court's Strickland cases and look at what remedy they order when there has been

ineffective assistance that shakes the reviewing court's confidence in the proceeding that produced it. They order a new proceeding. They don't order a specific sentence. That's why the outcome has never been the yardstick by which ineffective assistance --

JUSTICE BREYER: I don't want to --I want to stop you there because I don't understand it. The suggestion is -- I'm not taking this case, I'm making up a hypothetical since we are discussing it really based on the next case. The defendant never heard the offer, never heard it. It is crystal clear that if he'd heard it, he would have accepted it. Okay. I'm trying to separate out difficulties of this case, which strikes me as difficult because of the facts, from the principle. And what I want you to do is to tell me why I shouldn't accept the principle, and then we can worry about what's a clear case.

MR. JAY: But I think the principle, Justice Breyer, is that you look at what -- you look at what it is the Court's being asked to set aside.

JUSTICE BREYER: Death. Let's say death.

MR. JAY: Right. So in this case you look at the death sentence. How was that death sentence produced? If the defendant can show, for example, that he got bad advice about the plea --

JUSTICE BREYER: He shows that never did he ever become aware, because his lawyer was sleeping and moved on vacation and never told him about the plea offer. That's my hypothetical.

MR. JAY: I think that's actually an easier hypothetical than the bad advice because you could show that if the lawyer then gets -- stands up and does a bang-up job at trial -- the defendant is convicted of capital murder, the defendant can't show any prejudicial effect on the trial -- that means that no other lawyer doing a better job could have gotten the defendant -- could even show a reasonable probability that a different verdict would ensue. That defendant has a reliable capital murder conviction.

JUSTICE ALITO: The Court has said that death is different. Do you think it is inconceivable that there could be a different rule for capital cases, such as a rule requiring that in a capital case any offer of a noncapital sentence as part of the plea bargain can actually be waived by the defendant in court so that this doesn't come up? This is not a capital case.

MR. JAY: This is not a capital case, and I think that it certainly --

JUSTICE BREYER: All right, if you don't

want to do the capital case, I'm still trying to get to the principle.

MR. JAY: I'm happy to do the capital case --

JUSTICE BREYER: I will change my hypothetical and say all that happened was that this perfect trial because of mandatory sentencing rules led him to prison for 50 years, as compared with a plea bargain that would have given him 2 years. Now, he is in prison for 48 years more, and I consider that that is at least harmful to him. So where the amendment doesn't speak of it, where the misbehavior of the lawyer is crystal clear, where it's 48 years more in prison, what is it that bars what seems to me obvious that an inadequate assistance of counsel, remedial through a specific decree saying reinstitute the offer, led to enormous unfairness and prejudice.

MR. JAY: Two points, Justice Breyer, and I want to make sure I get out my answer to your capital hypothetical, because you don't look just at whether the sentence that resulted was worse than the sentence that could have resulted. If that were the case, Fretwell would have come out the other way. That is death, with no objection made, life sentence if the objection had been made. So it's not an outcome -- it's not a narrow

comparison of outcomes. What you look at is how the sentence was produced. Is this defendant entitled, had this -- to a lesser sentence?

Is this -- had this defendant had a better lawyer at sentencing, is there even a reasonable probability that that lawyer, through a different strategy for identifying a legal error --

JUSTICE SCALIA: Mr. Jay, you disagree with the assertion that Justice Breyer made that this was unfair. This man deserved to get the sentence he got, didn't he? He had a full and fair trial. A jury of 12 people, finding him guilty beyond a reasonable doubt, determined that he deserved that sentence. How could it be unfair to give him the sentence that he deserved?

MR. BURSCH: Yes, that's correct. In every case --

JUSTICE BREYER: Let's say there is an occasion where people don't get the sentence that they deserve because, for example, the lawyer was inadequate. I mean --

MR. JAY: And in those cases, Justice Breyer, you show that the lawyer had a bad strategy at sentencing. That may well have been the same bad strategy that led the lawyer to recommend a not guilty plea. Let's go to trial on my crazy strategy. If he

can show that and he can show that a better lawyer with a better strategy would produce a different result, then the Sixth Amendment entitles that person to a new proceeding. The Sixth Amendment never entitles a person to have a court order a particular sentence.

And you can't use the prosecutor's offer made at a different time as the benchmark and say: Well the prosecutor was okay with it at this other time; therefore, the prosecution must be forced to live with it now. And that's because a plea offer rests on a number of considerations: The need to obtain the defendant's cooperation in other cases; the desire to spare the witnesses and the victim the burdens of trial; and frankly, to avoid the risk of an acquittal. And the prosecution in this case and in cases like this one, where there has been a reliable conviction and reliable sentencing, the prosecution has already incurred all of those burdens. So to look at the 51-month minimum offer that was made 8 years ago and have that be the benchmark simply is not something that this Court has ever done in its Strickland cases. And I think it's revealing about the Respondent's --

JUSTICE KAGAN: Mr. Jay, you don't contest that plea bargaining is a critical phase, entitling somebody to a lawyer and to an effective lawyer, do you.

MR. BURSCH: We don't -- we don't think -- that's not part of our argument here.

JUSTICE KAGAN: Yes, because we have said that many times, isn't that right?

MR. BURSCH: Well, the Court -- let me be precise, Justice Kagan, because there are two things that the Court can be talking about. There's the -- there's the interaction between the State and the defendant, and that's where the Court has customarily used language like "critical stage," a confrontation between the defendant and the prosecution.

That's not what we have here. This is about private advice between the lawyer and the client, and we're not contesting --

JUSTICE KAGAN: What we have to recognize -- is that plea bargaining is a critical phase because about 98 percent of the action of the criminal justice system occurs in plea bargaining. And to deprive somebody of a lawyer at that stage of the process, where 98 percent of the action occurs, is inconsistent with the Sixth Amendment. That's what we've said. Isn't that right?

MR. BURSCH: Well, I don't think the Court has faced up -- faced this particular situation, Justice Kagan.

JUSTICE KAGAN: So it's not a critical phase. It's only a critical phase depending on the outcome of what happens at that phase?

MR. JAY: We are -- we are assuming that -- that Mr. Cooper in this case had a right to receive effective advice about whether to enter this plea. But our position is that he wasn't prejudiced because what --

JUSTICE KAGAN: Has -- have you ever seen a critical phase before in our Sixth Amendment jurisprudence where the right to a lawyer depends upon what happens during that critical phase, where if one outcome results there is no Sixth Amendment right, but if another outcome results there is?

MR. JAY: Well, again, we don't think this is in any way crucial to deciding this case, but Scott v. Illinois, Justice Kagan, is an example of that.

JUSTICE SCALIA: Mr. Jay, couldn't -- couldn't it be said that what our cases hold is that pleading guilty is a critical phase. Would that be enough to explain our cases?

MR. JAY: It certainly is correct that pleading -- a guilty plea hearing, where the defendant --

JUSTICE KENNEDY: Well, it's correct, but is

it enough? Do you want us to write an opinion that plea negotiations are not a critical stage of the criminal process unless at the end of the day a guilty plea results?

MR. JAY: That's not at all what we are asking, Justice Kennedy. What we are asking --

JUSTICE KENNEDY: So Justice Kagan and I want to know what your test is.

MR. JAY: Our test to resolve this case is to look at what it is that the habeas petitioner is challenging. He's challenging the conviction and the sentence. In the conviction, he was found guilty by a jury. He now says, page 14a of the red brief, that he is guilty and he wishes he had pleaded guilty sooner.

No basis for challenging the conviction.

May I finish the thought on the sentence?

CHIEF JUSTICE ROBERTS: Sure.

MR. JAY: And -- on this sentence, he was sentenced in accordance with law. He had effective representation at sentencing and he got the sentence that corresponds to the counts of conviction. What he wants is to reinstate a deal that was in the prosecution's discretion to offer once upon a time.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Newman.

ORAL ARGUMENT OF VALERIE R. NEWMAN

ON BEHALF OF THE RESPONDENT

MS. NEWMAN: Thank you, Mr. Chief Justice, and may it please the Court:

It is uncontroverted here that Anthony Cooper received incompetent advice from his counsel. It is uncontroverted here that as a result of that incompetent advice Mr. Cooper is serving between 100 and 134 months of extra time of imprisonment.

JUSTICE GINSBURG: I think it's not -- that he got ineffective assistance, yes, that is not controverted. But that he would have gotten the 51 months or 68 is certainly controverted because of two interventions: The prosecutor can say no deal; I'm withdrawing it, even after an initial acceptance; and the judge can say, I think 51 to 68 is entirely improper for what this man did.

MS. NEWMAN: Those are both true, Justice Ginsburg -- - Justice Ginsburg, but however the Strickland test requires a reasonable probability of a different result. And on this record, we have no reasonable probability -- we have no reason to expect that that's not exactly what would have happened.

JUSTICE ALITO: The relief that you want is

specific performance on the plea bargain.

MS. NEWMAN: Correct.

JUSTICE ALITO: Isn't that correct?

What if it had come to light, come to the prosecutor's attention during this intervening time, that your client had committed four or five other shootings? Would you still be entitled to specific performance?

MS. NEWMAN: Yes. We evaluate the case, and the Strickland analysis is an imperfect -- the Strickland remedy is an imperfect remedy. It has always been an imperfect remedy. It will always be an imperfect remedy.

JUSTICE KENNEDY: What -- what is the judge supposed to do? Let's say the remedy is it goes back before the judge. We are trying to unwind the clock or whatever the metaphor is. Does the judge have to prescind all knowledge of what he learned in the trial?

MS. NEWMAN: Well, this Court has stated numerous times that it presumes a conscientious decisionmaker, and a conscientious decisionmaker would put --

JUSTICE KENNEDY: Well, I'm asking what -- I'm a conscientious decisionmaker and I'm asking for your advice on what I should do. I know the details of

this crime, which were more horrific than I would have expected because I've heard them at the trial. Do I just somehow forget about that -- prescind that?

MS. NEWMAN: You would evaluate the case as you would have evaluated it at the time of the proceedings.

JUSTICE KENNEDY: The answer is "yes." I -- I ignore everything that I learned during the trial?

MS. NEWMAN: Yes, because the deficient -- you evaluate things at the point of the deficient performance. And at the point of the deficient performance, the judge had a certain amount of information before him, the prosecutor had a certain amount of information before him, and the defense attorney had a certain amount of information --

JUSTICE ALITO: I mean, that's pretty incredible. It doesn't matter what the defendant has done in the -- has been discovered to have done in the interim. Committed five murders, ten murders?

MS. NEWMAN: Well, in that case --

JUSTICE ALITO: Wipe it out of your mind; you get -- you get the plea bargain that was offered at an early point in -- in the investigation of the case?

MS. NEWMAN: Yes, because what happens in ineffective assistance of counsel claims is the State

has to bear the burden of the unconstitutionality. And so that is a price that this Court has said the State will bear when there is -- when there is a constitutional violation, because there is no perfect --

JUSTICE GINSBURG: The judge -- the judge, he knows what the plea -- let's say he knows what the plea bargain was, but he also knows that for one of the crimes, felon in possession, that alone, the sentencing range is 81 to 135. So without any, considering anything that happened at trial, the judge knows that the plea bargain was for less than if the man had been charged with -- only with a felon in possession.

MS. NEWMAN: Yes, that's accurate.

JUSTICE GINSBURG: So it -- it seems most unlikely that a judge would have accepted the plea bargaining for 51 to 68 for the crimes that were charged.

MS. NEWMAN: No, I would disagree with that. In this court and I can represent to the Court in my practice before this court, which I have practiced before this court for many, many years, this plea bargain was an ordinary plea bargain. This was not anything extraordinary. It was very run of the mill. It was -- it was a run of the mill case --

JUSTICE GINSBURG: That may be, but is it

not true that the sentence range was 81 through 135 for felon in possession?

MS. NEWMAN: I did not -- typically, you only score out the guidelines for the most serious offense. So the guidelines may have been high for the felon in possession offense, but however the judge -- in fashioning the remedy, you are not going to -- this Court would not take discretion away from the judge. So in fashioning the remedy, in adopting the remedy of the Sixth Circuit if this Court were to do that, this case would go back before this same judge if he's still on the bench, and it would be -- would put people back -- Mr. Cooper would accept the plea, but if -- the judge retained sentencing discretion.

JUSTICE BREYER: It wouldn't be a problem. The problem with Justice Alito's hypothetical, I take it, is what the order would say is that the prosecution has to for a reasonable time extend the same offer. And then if it's accepted, you go to the judge. The judge doesn't have to accept the plea.

MS. NEWMAN: Right. You can't find --

JUSTICE BREYER: You can't make him do that. But I have a bigger problem with this case, which is -- which I may be the only one to have. But as I've looked at it, I don't see ineffective assistance of counsel

within the AEDPA meaning. That is, you have two courts in the State which have said this is not ineffective, and as I look at it it's somewhat ambiguous at best -- and we have the Sixth Circuit saying it is. Well, I know both sides agree, but I mean, both sides couldn't make us decide a case by saying there's a murder when in fact it's not.

I mean, so what am I supposed to do about that? I find this a tough case. I have read the record, and in my own opinion at this moment, perhaps no one else's, there is no ineffective assistance of counsel such that the Sixth Circuit could set that aside -- a contrary finding of the State court.

So what do I do?

JUSTICE SOTOMAYOR: If Justice Breyer permits me to add an addendum to give the reasons why I might agree with him, or a way of viewing this, as I read the lower court's decisions, they said there wasn't ineffectiveness, because he was just trying to get a better deal.

And I think that, translating what he said, the very reasonable view by the court was, the prosecutor may think of a lesser charge, because if this guy really wanted to kill this woman he would have hit her head or her chest, but he aimed low, so he was

really just angry and shooting enough so that if he hit her, okay, if she died, okay. But he really didn't have that heinous intent to execute a gunshot to the brain. And so he was hoping to negotiate something better. If that's -- and Justice Breyer's shaking his head. If that in fact, if this is an AEDPA case, and we have to give deference to the State courts, doesn't that resolve this case?

MS. NEWMAN: No.

JUSTICE SOTOMAYOR: We have to give deference to their finding.

MS. NEWMAN: You do have to give deference to their finding, there is no question under AEDPA there is deference. And there is actually no question, there is sort of a doubly deferential review, given the Strickland analysis. However, the State courts did not decide this case on Sixth Amendment grounds, so there is nothing to give deference to. The State courts decided this and the trial court said Mr. Cooper made his own choices. That is not an ineffective assistance of counsel analysis.

The court of appeals in Michigan also did not engage in a Sixth Amendment analysis. They adopted the trial court and said that Mr. Cooper made his own choices. So there is -- and

this claim was raised specifically on Sixth Amendment grounds from the very beginning of the appeal until it reached this Court. So there is no AEDPA deference to give to the State court's decision. There is no question as well that it was ineffective assistance, because the State court record does not bear out that Mr. McClain was trying to get a better deal.

CHIEF JUSTICE ROBERTS: You said earlier that the district court, the trial court judge, still retains discretion as to whether or not to approve the plea bargain, right, whether to accept it?

MS. NEWMAN: The sentencing.

CHIEF JUSTICE ROBERTS: Yes -- well, which is it, the bargain or the sentence? It includes the sentence, correct?

MS. NEWMAN: It's a sentence recommendation and under Michigan law the judge cannot --

CHIEF JUSTICE ROBERTS: He has discretion -- he has discretion. So is he allowed to take into consideration all that's happened before, not just with respect to guilt or innocence or the result of the trial, but in imposing the sentence or approving it?

MS. NEWMAN: Well, he can take into account anything that he could have taken into account in the first place. But in this case --

CHIEF JUSTICE ROBERTS: But nothing that he learned at trial, I take it.

MS. NEWMAN: I would argue no. I mean, certainly the court will set the parameters of --

JUSTICE SCALIA: What if he -- what if he turns it down, Ms. Newman. He says, no, I can't accept this. What happens then? He had a new --

MS. NEWMAN: I would say there is not an option -- oh, I'm sorry, so the judge --

JUSTICE SCALIA: Yeah, the judge. It goes back to the judge. We agree with you and we send it back to the judge. We reinstate the offer, okay. He accepts the offer and it goes to the judge and the judge says, no, this is outrageous. No, I'm not going to approve of this plea bargain. What happens then?

MS. NEWMAN: Well, in that case, the case would proceed under Michigan law. In that case the judge --

JUSTICE SCALIA: We would have a new trial, is that it?

MS. NEWMAN: No. I think -- I think it would be perfectly acceptable to say that a new trial is not an appropriate remedy in this case, because he had a trial.

JUSTICE SCALIA: Okay. So if the judge

turns it down, then the prior trial is valid, is that right?

MS. NEWMAN: It would depend on the reasons why the judge would turn it down. If would have to be a legitimate reason under a state law, otherwise there would --

JUSTICE SCALIA. Yeah. Then the prior trial is okay?

MS. NEWMAN: Not that it's okay, but I think under imperfect circumstances it's the result that we're --

JUSTICE BREYER: Why? Why? Why, why wouldn't the remedy be -- as -- judging from what you said before, is an order saying to the prosecution, re-institute the plea bargain and give him, a week or whatever it is. Now we imagine the defendant says I accept. So then they go to the judge, just as they would have before.

MS. NEWMAN: Right.

JUSTICE BREYER: And the judge has the freedom to accept that or to reject it.

MS. NEWMAN: Correct.

JUSTICE BREYER: If he rejects it, there is no plea agreement. Now the defendant must plead. He can plead guilty or not guilty. And whatever flows from

that, flows from that.

MS. NEWMAN: That's also a perfectly acceptable -- that's also a perfectly acceptable remedy. The purpose -- the reason --

JUSTICE SCALIA: Wait. Both can't be perfect. Either he has another trial, although he's just been found guilty by a jury of 12, with an entirely fair proceeding or else he doesn't have a new trial.

JUSTICE BREYER: His suggestion is perfect but mine is more perfect.

(Laughter.)

MS. NEWMAN: Okay.

(Laughter.)

JUSTICE BREYER: You don't, you would -- he's right, you would have to, under my suggestion, have a new trial; even though there was a trial that took place two years ago or whatever it is, correct?

MS. NEWMAN: Correct.

JUSTICE BREYER: But that isn't the end of the argument.

So, if you are the defense counsel, the best thing for you to do is not communicate any plea offer you get, and then if your client is found guilty, then you can go back and say, oh by the way, I didn't tell you about this, and he gets a whole new trial.

MS. NEWMAN: No. The bar on habeas -- well the bar on Strickland, even not on habeas, is a very high bar, as this court said in Padilla. And it's not a bar that can often be met. And so you have to show under a Strickland analysis deficient performance and prejudice.

CHIEF JUSTICE ROBERTS: A deficient performance --

JUSTICE ALITO: Well, I don't know if that's going to be so hard to show. Do you think it's feasible to draw a distinction between this case, where there was arguably inaccurate legal advice, and the case in which the defense attorney simply makes a terribly mistaken calculation about the chances of a favorable verdict at trial? A favorable plea bargain is offered, caps the guy's possible sentence at let's say three years. The defense attorney says, we've got a great shot at an acquittal, let's go to trial. I'm going to rip the prosecution's witnesses apart. The trial turns out to be a disaster. Convicted on all counts. 25 years. Do you think that it's impossible for the rule that you want us to adopt here to be applied in that situation as well?

MS. NEWMAN: I think it would be much more difficult, because this Court on habeas review and state

courts on non-habeas review are very deferential to strategic decisions. Almost anything that qualifies --

JUSTICE KENNEDY: Well, you say that. But, as an administrative matter, I think we have to have some concern that these plea negotiations and discussions are in myriad circumstances. The defense attorney is by the water cooler and the prosecutor walked by and says I'm thinking of offering you a good bargain in the Jones case. He knows he's going to have that prosecutor in court the next day and really beat him. He thinks he's going to soften him up, so he doesn't communicate it to the client and the prosecutor later says withdrawn. We are going to have inquiries post hoc on all these negotiations and discussions. And it seems to me that absent some other rule, like I don't think we have the authority to impose that all plea offers must be in writing and be stated with specificity, if that is what you are proposing, is simply unworkable.

MS. NEWMAN: I disagree, Your Honor. We have had Strickland that held jurisprudence for three decades. There was a flood gates argument when Hill was decided that we are going to have all these people -- that we -- and we have had since McMahon v. Richardson, this Court saying plea bargaining is a critical stage.

JUSTICE KAGAN: And most of the circuits follow your rule, isn't that right?

MS. NEWMAN: Right. We already had unanimity --

JUSTICE KAGAN: And the flood gates have not opened.

MS. NEWMAN: I'm sorry.

JUSTICE KAGAN: Go ahead.

MS. NEWMAN: Yes, we have unanimity in the federal circuits and we have -- almost every state that has addressed this issue has addressed it in the same manner.

JUSTICE GINSBURG: Unanimity on the remedy? Here the court said that the writ shall be granted conditioned on the state taking action to offer the 51 to 85 months plea. So that doesn't bind the judge, but it does bind the prosecutor.

MS. NEWMAN: Correct.

JUSTICE GINSBURG: And it removes the possibility of the prosecutor saying, "I would have withdrawn that initial offer. "

MS. NEWMAN: Correct.

JUSTICE GINSBURG: So the prosecutor -- the remedy is -- is that the remedy that's uniform? That the prosecutor has no discretion, only the judge does?

MS. NEWMAN: Well, the remedies vary. When I said unanimity, I didn't mean every Court in every circuit does exact -- handles this exactly the same way. Unanimity in the sense that every federal circuit and almost every state that has addressed this issue, and they have addressed this issue for over 30 years, has found that there is a cognizable Sixth Amendment violation that can be remedied on appeal.

JUSTICE KAGAN: And perhaps the lack of unanimity on the remedy question is appropriate. I mean people have been trying to suggest different remedies. But perhaps one way to deal with the remedy question is to recognize that these cases present very different factual circumstances, that there is a lot of variation in them. And to give a substantial amount of discretion to the lower courts to work out what the best remedy is, consistent with that factual variation.

MS. NEWMAN: Absolutely. And it's the same thing the courts have been doing, again, since Strickland and Hill were decided.

JUSTICE SCALIA: Like what. What factual variation do you think justifies a categorically different remedy. I mean, it seems to me some of the remedies are good and some are bad.

MS. NEWMAN: Correct.

JUSTICE SCALIA: What factual -- I mean, give me an example of the different remedies and how a certain fact situation could make one okay and the other not okay.

MS. NEWMAN: Well, even in the two cases before the Court today. I mean, in Mr. Frye's case he accepted a plea and the state court ordered a new trial as a remedy for the ineffective assistance of counsel violation. In my case and Mr. Cooper's case --

JUSTICE SCALIA: Right. And why was that okay there? Why was that okay there? What factual circumstances made that okay there?

MS. NEWMAN: Well, that's just -- I don't know that the factual circumstances make it okay, but it was the remedy that the State -- I'm not sure I understand your question. It was a remedy that the State ordered and in this case it's just the remedy that was ordered by the Federal court was a remedy --

JUSTICE ALITO: -- a situation where the -- where the defendant turns down -- where a plea is turned down and the defendant goes to trial, are there any facts in -- any facts that would make any remedy other than specific performance the correct remedy in that situation?

MS. NEWMAN: These cases are so

fact-specific, Your Honor, I don't want to evade the question about a hypothetical, but there -- every case is so fact-specific that I think there -- the possibility exists that a -- that --

JUSTICE ALITO: You're recommend -- you're recommending specific performance as the remedy for your case, and I agree with you that is, if there is to be a remedy, it's the only remedy that makes a -- any modicum of sense. The remedy of giving a new trial when the person has already had a fair trial makes zero sense.

MS. NEWMAN: That's correct.

JUSTICE ALITO: So what I'm looking for is any situation -- you said leave it to the discretion of the trial judge. But what is -- what discretion is there? What remedy in that situation other than specific performance would be an appropriate -- would remedy what you claim to have been the violation?

MS. NEWMAN: Well, in -- in Mr. Cooper's case I think the -- the remedy in the Sixth Circuit is the only appropriate remedy that -- that puts every -- that is narrowly tailored to the Sixth Amendment violation, and that's what this Court has said.

I mean, this Court has given direction to the courts, to lower courts that you just narrowly tailor the remedy to fit the situation, because there is

so many factual --

JUSTICE BREYER: Well, let's go back because I'm now becoming convinced -- I am -- I am trying out what Justice Scalia suggested. Maybe that does work better. What -- what you'd say is first, throw the defendant out, unless you are convinced that not only is there ineffective assistance, but also it would have made a difference; he would have accepted the plea bargain.

MS. NEWMAN: Correct.

JUSTICE BREYER: So now they have to hold the plea bargain open. They then do it. They then go to the judge, like any plea bargain. 90 percent of the time the judge will say fine, and that's the end of it.

MS. NEWMAN: Correct.

JUSTICE BREYER: But should the judge decide that this is a case where he would reject the plea bargain, for any one of a variety of reasons, then our assumption was wrong and we reinstate the previous trial.

Now does a judge just say it's over, you were tried, you were convicted, that's the end of it? What's wrong with that as a remedy? I mean, what's -- why is that -- why does that muck up the criminal justice system in some way?

I think that's pretty much what Justice Scalia suggested, and I -- and I am now trying that out, because the more I think about it, the more I think maybe that's okay.

MS. NEWMAN: Well, I -- I believe that is what is suggested. And I --

JUSTICE SCALIA: Don't -- don't blame it on me.

(Laughter.)

JUSTICE SCALIA: I don't -- I don't -- it's your suggestion that we set aside a perfectly fair conviction.

JUSTICE BREYER: Yes, but I --

JUSTICE SCALIA: This is just a hypothetical. If you are going to set it aside --

MS. NEWMAN: Right.

JUSTICE SCALIA: -- I think you should put it back in.

MS. NEWMAN: Well, again, right. It is going to depend on what happens -- happens below, and that -- we don't -- I mean, the -- the concept here is one --

JUSTICE SOTOMAYOR: You're -- you are begging the question.

MS. NEWMAN: Okay.

JUSTICE SOTOMAYOR: Okay? Because yes, I think Justice Breyer's first statement, you have to prove the guy was going to take the plea, because there is no sense in -- in giving him a remedy that he would have never sought.

MS. NEWMAN: Right. Absolutely.

JUSTICE SOTOMAYOR: All right? But it goes back to, I think it was Justice Alito or Chief -- or the Chief Justice's question of on what basis can the judge reject the plea? You have said earlier that he has to put aside any information he learned during the trial, and that's really the nub of this case. What are the grounds that you are proposing the judge can use to reject the plea?

MS. NEWMAN: That -- any grounds that would have existed in the original circumstances. So if the judge -- in -- in Michigan there is a variety of reasons why a judge can say I -- I'm not going to accept this sentencing recommendation.

CHIEF JUSTICE ROBERTS: So how are you ever going to know that the defendant would have accepted the plea agreement? Because by not accepting it he has a chance of going scot-free. He's going to have a fair trial, that's the assumption; and he may be acquitted.

So how is a judge supposed to say -- I mean,

presumably the defendant will always say, I would have taken that deal, because it's better. So how is a judge supposed to go back and decide whether that's true or not?

MS. NEWMAN: Well, always -- in large part, it's not going to depend on the defendant, it's going to -- in larger part it's going to defend on -- depend on defense counsel --

CHIEF JUSTICE ROBERTS: Why?

MS. NEWMAN: -- in making that determination, because Strickland always looks at strategy. I mean that -- that's the underlying --

JUSTICE KENNEDY: I think you can answer the Chief Justice's question. The Chief Justice said how are you going to know -- you have to show prejudice.

MS. NEWMAN: Correct.

JUSTICE SCALIA: And there is no prejudice unless he would have accepted the deal. How are you going to know that he would have? Of course he is going to say he that would have, but how is a trial judge going to make a credibility determination on that -- on that issue? I guess it's just a credibility determination. I don't know how he's going to do it. I think you can answer the Chief Justice's question yes or no.

MS. NEWMAN: Yes -- I don't think I can answer it yes or no.

CHIEF JUSTICE ROBERTS: How is the judge -- how is the judge ever going to know, be able to decide whether the defendant would have accepted the deal or not?

MS. NEWMAN: The same way that -- that trial courts decide any question of fact. In this case we had testimony from the trial attorney. The trial attorney told the judge, I told him not to accept the plea because he legally could not be convicted of the charge. I mean, Mr. Cooper --

CHIEF JUSTICE ROBERTS: It's the defendant's choice, not the lawyer's choice. It's the defendant's choice.

MS. NEWMAN: But he -- but he has the right to assistance -- to the effective assistance of counsel in making that critical choice, and he didn't have the effective assistance of counsel on -- Mr. Cooper wrote letters to the judge --

CHIEF JUSTICE ROBERTS: That's the effectiveness question. I understand that to be taken out of the case by the concessions on the other side. I'm talking about the prejudice question.

MS. NEWMAN: Correct.

CHIEF JUSTICE ROBERTS: How is a judge supposed to know?

MS. NEWMAN: The judge looks at the record before him. So in this case we had Mr. Cooper's testimony --

CHIEF JUSTICE ROBERTS: People have different -- some people are willing to take the chance. Okay? Let's say the there is a 20 percent chance that the person will be found guilty.

Some people will say, I'm willing to take that chance because I just don't want the chance of -- of going to jail. I am willing to roll the dice. Other people will say no, that's too much. Whether you want to go to jail may cut one way or the other, but how is a judge supposed to decide? Ask him, are you -- do you take chances?

MS. NEWMAN: No, by -- by looking at -- Mr. Chief Justice, by looking at the evidence in the record before him. In this case Mr. Cooper wrote --

CHIEF JUSTICE ROBERTS: So the judge should decide whether he would take the deal.

MS. NEWMAN: No --

CHIEF JUSTICE ROBERTS: Look at the evidence before him and say, boy, I would take that deal.

(A little laughter.)

MS. NEWMAN: No, no -- no, no, no. Mr. -- Mr. Cooper wrote two letters to the judge saying I want to accept a plea. Mr. McLean, the trial attorney who provided the incompetent advice, told the judge in a post-conviction hearing that Mr. Cooper wanted to take a plea. I mean, there -- there is no -- it is beyond question in this case.

JUSTICE ALITO: Do you think the length and the complexity of the trial has any bearing on this? This was a relatively short and simple trial. But let's say a prosecutor offers a plea deal in a case in which the trial is going to take 6 months and it's going to cost a million dollars and if they try that case, there are going to be other cases that they won't be able to try. The plea is rejected, the case is tried, and then afterwards the -- the remedy is to -- to -- to reinstate this plea offer, which was predicated on the relieving the prosecutor of the burden of having to try that case.

MS. NEWMAN: Well, every plea bargain is predicated on relieving the prosecution of having the burden of -- of trying a case. I mean, the key here is, let's get back to what Strickland stands for and it's the unreliability or the unfairness of the proceedings. It's not just an unreliability determination.

So in this case Mr. Cooper had two choices.

He could take a certain plea with almost a certain sentence or he could have a -- really what was a charade of a trial because his attorney told him, you -- you can't be convicted of this offense; you will not be convicted of this offense following the trial. You can be convicted of a lesser --

JUSTICE GINSBURG: You conceded -- you conceded he had a fair trial. That's not in the case.

JUSTICE KENNEDY: Right.

MS. NEWMAN: I didn't --

JUSTICE GINSBURG: It can't be a charade and still be fair.

MS. NEWMAN: It's an unfairness of the entire proceedings that were presented. All right? So there is no separate habeas claim with respect to the trial, but the -- but reality is when you look at the criminal -- when you look at the Sixth Amendment, it talks about the criminal --

JUSTICE KENNEDY: You are saying it was unfair to have a fair trial?

MS. NEWMAN: I'm saying it's unfair to go to trial when your attorney tells you, you can't be convicted.

JUSTICE KENNEDY: You are saying it's unfair to have a fair trial; isn't that correct?

MS. NEWMAN: I'm --

JUSTICE KENNEDY: That has to be your position.

JUSTICE SCALIA: It is.

MS. NEWMAN: I'm saying it's unfair to say that the trial erases the unfairness when there was no possibility but for a conviction at the end of the road. So this was a certain guilty plea or this was a -- wrong guilty plea under the math of a trial.

CHIEF JUSTICE ROBERTS: Oh, but you can never say that there is no possibility of acquittal. Juries can decide not to convict no matter what the evidence.

MS. NEWMAN: There was no defense. I mean, there was no possibility --

CHIEF JUSTICE ROBERTS: That's up to the jury. It's not up to us ex ante to decide this guy is definitely going to lose, so let's not waste our time. Juries -- I don't want to say often but it is not -- it's certainly not inconceivable that the a may decide for whatever reason we are not going to convict this guy. Right?

MS. NEWMAN: That's true, but in this case, Mr. McLean told Mr. Cooper he would be convicted. I mean, he assured him of conviction. He said: You will

be convicted at the end of the trial; you're just going to be convicted of a lesser offense.

JUSTICE SOTOMAYOR: Counsel, what was the defense at trial?

MS. NEWMAN: I'm sorry?

JUSTICE SOTOMAYOR: What was the defense at trial?

MS. NEWMAN: There wasn't -- there was no defense presented. There was no real defense presented at trial because --

JUSTICE SOTOMAYOR: Did he deny having committed the act of the shooting?

MS. NEWMAN: Never.

JUSTICE SOTOMAYOR: At trial?

MS. NEWMAN: No.

JUSTICE SOTOMAYOR: Is it the case that in most of the cases in which motions of this kind are brought to trial judges if there is a defense of mistaken identity or of "I didn't do it," that judges often find the defendant has not proven that they would have taken the plea?

MS. NEWMAN: I didn't --

JUSTICE SOTOMAYOR: In most cases in which a trial is had, where the defendant is pleading misidentification or: I just didn't do this act. In

those cases, do most of the trial judges not permit or don't find that the defendant has met their burden of proving that he or she would have taken the plea?

MS. NEWMAN: I don't know that the cases bear out that if you have a valid defense it would be harder. But I would agree with that -- if that's a hypothetical, that if you have a valid defense, it would be a lot harder to be in this position of showing that you would have taken the plea.

JUSTICE SOTOMAYOR: I thought of this case, and you can correct me if I am wrong, that your client told the attorney from the beginning: I did it; I want to plea.

MS. NEWMAN: That is correct. There was never -- There was no question in this case at any step, at any stage of the proceedings and there was no -- never, never anything from the trial attorney other than incompetent advice. He never went to trial for an acquittal. He went to trial because he believed legally his client would be convicted of a lesser offense that would put him in a better position than if he had accepted the plea. That's the only reason.

CHIEF JUSTICE ROBERTS: You said that -- I want to make sure I understood your point. You said there was no defense. Does that mean you didn't --he

had a frivolous defense or that he literally did not put on a defense, just said: Just this state has to prove the case and they haven't done it.

MS. NEWMAN: Well, he held the state to its burden, and that is a defense. I mean, I...

CHIEF JUSTICE ROBERTS: Did he --

MS. NEWMAN: I'm not saying literally no defense, and I apologize if that's the what he it came across, but no cognizable defense. It was not mistaken identification or we didn't intend to hit her. I mean, he never contested the basic facts of that case.

CHIEF JUSTICE ROBERTS: Something the jury could have accepted, right? Even if it's not legally true that if you shoot him at the -- the person below the waist, that's not a defense, but I can see a reasonable juror saying he probably didn't intend to kill her. He shot her below the waist. Maybe that is not such a bad strategy.

MS. NEWMAN: Except the defense counsel on this record specifically said that he -- that he was not running a strategy and hoping for that, that he told the client legally the only thing that could happen to him so he was in a better position by going to trial.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Bursch, four minutes.

REBUTTAL ARGUMENT OF JOHN J. BURSCH

ON BEHALF OF THE PETITIONER

MR. BURSCH: Thank you. I would like to start at the one point where I think all of us, including counsel on both sides agree, and that's that a second trial after an error-free first trial doesn't make sense. And that right there says a lot about Mr. Cooper's case, because a Strickland remedy is typically a new trial. And it's exceedingly strange that they are now saying that: I don't want a new trial. That demonstrates that what they are claiming is not a Strickland violation.

I would like to address, Justice Breyer, your suggestion that maybe you could have specific performance of the plea; and if it's rejected, then the trial result could simply be re-imposed. And the question is: Well, what's the problem with that? And I can tick off at least five.

First, as Justice Ginsburg pointed, out it takes away the prosecutor's ability to withdraw the plea which he or she undeniably would have had the right. Second, as Justice Alito said, it ignores that there is information that could be learned in the interim. Mr. Cooper could have shot three or to four other people.

Third, it ignores the fact that an error-free trial has taken place. The prosecutor has taken the risk of putting that the 8-year-old sexual abuse victim on the stand, and you cannot take that risk away.

Fourth, as I already mentioned, we have the separation of powers issue and prosecutorial discretion. Fifth, we are going to have intractable problems. Say the offer was plead to A, we will dismiss B; he rejects it based on deficient advice; you go to trial; he is convicted on A and acquitted on B, and now we are going to try to enforce the plea on A? I mean, that's almost a double jeopardy problem. So there is intractable problems. The second point I want to make is about the death situation. And that's one we take very seriously. And, Justice Alito, it may be that in a death penalty situation there could be a due process right or some other constitutional right that may mitigate in favor of requiring something be put on the record. But what is clear is that under this Court's existing precedent, that is not a Strickland violation because the amount of the sentence, whether it's death or 50 years, has nothing to do with the reliability of the adjudicatory proceeding and the sentence. Finally, the last point that I want to make is something else on which we can all agree. Mr. Cooper is guilty of shooting Kali Mundy.

He also got exactly the sentence that the people prescribed for the crime that committed. There is very little unfair about holding him to that sentence. As Justice Kennedy said, "It's the position of Mr. Cooper that it is unfair to have a fair trial. " And from our perspective, that is really the beginning and the end of this inquiry. And unless you have any further questions --

JUSTICE KENNEDY: I have one -- It's more proper, I think, for the government of the United States under the Federal rules, Rule 11, there has to be a colloquy before a plea is entered. Do you think the Federal rules and perhaps state rules should be amended so that judges, trial judges before imposing a sentence inquire: Have there been plea offers; have they all been communicated to the defendant? Is that good practice?

MR. BURSCH: It could be good practice, but it wouldn't have solved the problem here, because even if they had put the fact of the plea on the record, the problem was the alleged deficient advice that the lawyer gave to the client in private. And so that doesn't solve the core problem. The core problem is that they are trying to claim that it was unfair to have a fair trial.

JUSTICE KENNEDY: Well, if they had -- if plea offer had come out -- I don't know how it would work. When you enter a not guilty plea, you enter a not guilty plea.

MR. BURSCH: Right. You know, the judge under your theory then would have had to inquire: Well, what advice did your attorney give you with respect to that? And then evaluate whether that advice was good advice or bad advice. And I respectfully submit that that would not be a good policy to adopt by rule.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:04 a.m., the case in the above-entitled matter was submitted.)

A

ability 57:21
able 49:4 51:14
above-entitled 1:11 60:14
absent 7:22,23 40:15
absolutely 8:16 12:23 42:18 47:6
absque 15:10
abstract 5:16 15:9
abuse 17:22 58:3
accept 4:18 17:1 20:16 32:13,20 35:11 36:6 37:17,21 47:18 49:10 51:3
acceptable 36:22 38:3,3
acceptance 28:16
accepted 20:12 31:15 32:19 43:7 45:8 47:21 48:18 49:5 55:22 56:13
accepting 11:2,3 47:22
accepts 36:13
account 35:23,24
accurate 31:13
acknowledge 9:21
acknowledged 9:23
acknowledges 8:1
acquittal 17:21 24:14 39:18 53:11 55:19
acquitted 47:24 58:10
act 54:12,25
action 25:17,20 41:15
add 33:16
addendum 33:16
addition 16:9
address 19:22 57:14
addressed 41:11 41:11 42:5,6
adjudicated 3:15
adjudication 5:14 12:18 15:7
adjudicatory 4:6 5:25 7:21 14:19 58:22
administrative 40:4
adopt 39:22 60:10
adopted 34:24
adopting 32:9
adverse 12:17
advice 3:12 4:15 11:22 12:20 13:3,4 14:20 20:25 21:6 25:13 26:6 28:7 28:9 29:25 39:12 51:4 55:18 58:9 59:21 60:7,8,9 60:9
advised 12:21
advising 12:8
advocate 16:15
AEDPA 33:1 34:6,14 35:3
affect 14:20
ago 24:19 38:17
agree 10:12,15 10:20 33:5,17 36:11 44:7 55:6 57:6 58:25
agreement 37:24 47:22
ahead 41:8
aimed 33:25
Alito 15:17,24 21:15 28:25 29:3 30:16,21 39:9 43:19 44:5 44:12 47:8 51:8 57:23 58:15
Alito's 32:16
alleged 59:21
allegedly 18:13
allowed 35:19
ambiguous 33:3
amended 59:13
amendment 4:7 4:25 5:24 8:17 9:10 10:11 14:11 15:6,15 18:21,22,25 19:3,9,20 22:11 24:3,4 25:21 26:10,13 34:17 34:23 35:1 42:7 44:21 52:17
amicus 1:19 2:7 18:6
amount 30:12,14 30:15 42:15 58:20
analysis 6:14 29:10 34:16,21 34:24 39:5
angry 34:1
answer 8:19,19 12:6 14:4 19:19 22:19 30:7 48:13,24 49:2
ante 53:17
Anthony 1:6 28:6
apart 39:19
apologize 56:8
appeal 9:13 35:2 42:8
appeals 34:22
APPEARANC... 1:14
applied 39:22
appointed 5:4
appropriate 8:14 36:23 42:10 44:16,20
approve 35:10 36:15
approved 17:3
approving 35:22
arguably 39:12
argue 36:3
argument 1:12 2:2,5,9,12 3:4,7 6:21 7:10,12 9:8 15:20 18:5 25:2 28:2 38:20 40:22 57:2
artfully 13:22
aside 20:20 33:13 46:11,15 47:11
asked 7:3 20:20
asking 27:6,6 29:23,24
asks 16:16
asserting 3:18 4:9
assertion 4:23 23:9
assistance 3:14 3:19,24 4:10 6:10,18,19,22 7:6 8:20,22,23 9:22,24 10:4 12:8 14:23,25 18:13,15,23 19:1 20:1,5 22:15 28:12 30:25 32:25 33:11 34:21 35:5 43:8 45:7 49:17,17,19
Assistant 1:17 1:21
assume 11:22 12:7,11
assuming 12:12 26:4
assumption 45:19 47:24
assured 53:25
attach 3:24
attack 18:12
attention 29:5
attorney 5:4 9:7 11:10,11,20 12:16 13:25 30:15 39:13,17 40:7 49:9,9 51:3 52:3,22 55:12,17 60:7
authority 40:16
avoid 6:7 17:23 24:14
aware 21:2
a.m 1:13 3:2 60:13

B

B 58:8,10
back 4:3 6:4 15:8 15:25 16:25 17:18 29:15 32:11,12 36:11 36:12 38:24 45:2 46:18 47:8 48:3 51:22
bad 10:2,3 20:25 21:6 23:22,23 42:24 56:18 60:9
balance 18:2
bandied 16:5
bang-up 21:8
bar 39:1,2,3,4
bargain 4:13,19 10:18 21:20 22:9 29:1 30:22 31:7,11,22,22

35:11,14 36:15 37:15 39:15 40:9 45:9,12,13 45:18 51:19
bargainer 9:25 10:8
bargaining 7:6 10:2,2,14,16 10:22 24:24 25:16,18 31:16 40:25
barrier 13:9
barriers 14:1
bars 22:14
based 5:13 18:13 20:9 58:9
basic 56:11
basis 27:15 47:9
bear 31:1,3 35:6 55:5
bearing 51:9
beat 40:10
becoming 45:3
begging 46:24
beginning 35:2 55:12 59:6
behalf 1:16,22 2:4,7,11,14 3:8 18:6 28:3 57:3
belief 11:16
believe 8:8 46:5
believed 55:19
bench 32:12
benchmark 24:7 24:19
best 7:9 13:19 33:3 38:21 42:16
better 13:20 21:11 23:4 24:1 24:2 33:20 34:4 35:7 45:5 48:2 55:21 56:23
beyond 13:15 23:12 51:6
bigger 17:19 32:23
bind 41:16,17
BLAINE 1:3
blame 46:7
boy 50:24
brain 34:3
break 9:7
Breyer 18:20 19:2,24 20:6,19 20:21 21:1,25 22:5,18 23:9,17 23:22 32:15,22 33:15 37:12,20 37:23 38:9,14 38:19 45:2,11 45:16 46:13 57:14
Breyer's 34:5 47:2
brief 16:15 27:13
bright-line 11:18
bring 17:7
brought 54:18
burden 31:1 51:18,21 55:2 56:5
burdens 24:13 24:18
Bursch 1:15 2:3 2:13 3:6,7,9 4:2 4:22 5:19,22 6:20 7:9,13,20 8:8 9:2 10:5,15 10:23 11:15,24 12:5,12,23 13:5 13:7,21 14:3,12 14:17 15:1,4,11 15:13,23 16:3 17:6 23:15 25:1 25:5,23 57:1,2 57:4 59:18 60:5

C

C 2:1 3:1
calculation 39:14
capital 14:16 15:18 19:22 21:9,14,17,18 21:21,23 22:1,3 22:19
caps 39:15
careful 7:14
case 3:4 5:11 6:8 7:10 12:11 13:8 14:16 19:4,5,17 19:19 20:8,10 20:13,17,22 21:18,22,23 22:1,4,22 23:16 24:15 26:5,16 27:9 29:9 30:4 30:20,23 31:24 32:10,23 33:6,9 34:6,8,17 35:25 36:16,16,17,23 39:11,12 40:9 43:6,9,9,17 44:2,7,19 45:17 47:12 49:8,23 50:4,19 51:7,11 51:13,15,18,21 51:25 52:8 53:23 54:16 55:10,15 56:3 56:11 57:9 60:12,13
cases 5:5 8:3,3 8:24 9:18 10:17 10:21,24 15:14 15:19 16:10 18:16 19:7,8,10 19:24 21:17 23:21 24:12,15 24:21 26:19,21 42:13 43:5,25 51:14 54:17,23 55:1,4
casts 6:25 15:6
categorically 42:22
causes 12:20
causing 13:3,4
certain 9:5 30:12 30:13,15 43:3 52:1,1 53:8
certainly 8:11 21:24 26:22 28:14 36:4 53:20
challenging 27:11,11,15
chance 47:23 50:7,8,11,11
chances 39:14 50:16
change 22:5
changed 6:7 16:20 17:8,13 17:19
charade 52:2,11
charge 12:9 33:23 49:11
charged 31:12 31:17
chest 33:25
Chief 3:3,9 16:21 18:3,8 27:17,24 27:25 28:4 35:8 35:13,18 36:1 39:7 47:8,9,20 48:9,14,14,24 49:3,13,21 50:1 50:6,18,20,23 53:10,16 55:23 56:6,12,25 60:11
choice 49:14,14 49:15,18
choices 34:20,25 51:25
choose 5:8
circuit 16:5 32:10 33:4,12 42:3,4 44:19
circuits 41:1,10
circumstance 17:13,19
circumstances 16:19 17:8 37:10 40:6 42:14 43:12,14 47:16
claim 3:19 4:10 6:11 35:1 44:17 52:15 59:24
claiming 57:12
claims 30:25
clear 9:3 20:11 20:17 22:13 58:19
clearly 9:17
client 11:12 12:9 12:9 25:13 29:6 38:23 40:12 55:11,20 56:22 59:22
clock 29:16
cocaine 8:14
cognizable 42:7 56:9
Coleman 14:14
collaterally 18:12
Collins 6:6,8
colloquy 59:12
come 19:22 21:21 22:23 29:4,4 60:2
comes 9:7
committed 29:6 30:19 54:12 59:2
communicate 5:12 38:22 40:12
communicated 59:16
compared 22:8
comparison 23:1

complexity 51:9
conceded 6:18 6:21 8:22 52:7 52:8
concept 46:21
concern 40:5
concessions 49:23
conditioned 41:15
conduct 12:16
confidence 18:17 20:2
confrontation 25:10
confronting 12:3
conscientious 29:20,21,24
consider 22:10
consideration 35:20
considerations 24:11
considering 31:9
consistent 14:13 42:17
consistently 3:13
constitutional 4:24 5:6,15 6:12 8:10 11:1 11:25 13:10,24 31:4 58:17
contemplates 4:25
contend 17:6
contention 11:16
contest 24:23
contested 56:11
contesting 25:14
contrary 33:13
controverted 28:13,14
convict 53:12,21
convicted 9:8 11:3,12 21:8 39:20 45:22 49:11 52:4,5,6 52:23 53:24 54:1,2 55:20 58:10
conviction 11:4 21:14 24:16 27:11,12,15,21 46:12 53:7,25
convictions 18:10,12,18
convinced 45:3,6
cooler 40:7
Cooper 1:6 3:5 17:11 26:5 28:7 28:9 32:13 34:20,25 49:12 49:19 50:19 51:2,5,25 53:24 57:25 58:25 59:4
cooperation 24:12
Cooper's 16:15 43:9 44:18 50:4 57:9
core 59:23,23
correct 6:20 12:11,12 15:23 23:15 26:22,25 29:2,3 35:15 37:22 38:17,18 41:18,22 42:25 43:23 44:11 45:10,15 48:16 49:25 52:25 55:11,14
corresponds 27:21
cost 51:13
counsel 4:17 5:4 6:6,18 7:6 8:5 9:22,25 10:4 11:1 12:8 13:8 13:10 14:5,8,23 14:25 15:5 18:3 18:14,15,24 22:15 27:25 28:7 30:25 32:25 33:12 34:21 38:21 43:8 48:8 49:17 49:19 54:3 56:19,25 57:6 60:11
counts 27:21 39:20
course 48:19
court 1:1,12 3:10 3:13 4:3,11 6:4 6:9 7:14,20 8:15 9:5,14 10:17,24 11:4 11:18 12:16,24 14:17 18:9,17 21:15,20 24:5 24:20 25:5,7,9 25:23 28:5 29:19 31:2,19 31:19,20,21 32:8,10 33:13 33:22 34:19,22 34:24 35:3,6,9 35:9 36:4 39:3 39:25 40:10,25 41:14 42:2 43:6 43:7,18 44:22 44:23
courts 4:3 16:5 33:1 34:7,17,19 40:1 42:16,19 44:24,24 49:8
court's 10:5 14:13 18:15 19:24 20:1,20 33:18 35:4 58:19
crack 8:13
crazy 23:25
creates 4:15
credibility 48:21 48:22
crime 30:1 59:2
crimes 31:8,16
criminal 10:21 17:16 18:23 25:17 27:2 45:24 52:17,18
critical 4:18,21 15:5 24:24 25:10,16 26:1,2 26:10,12,20 27:2 40:25 49:18
Cronic 7:16 9:17 15:14
crucial 26:16
crystal 20:11 22:13
curiae 1:19 2:7 18:7
customarily 25:9
cut 50:14

D

D 3:1
damage 15:12,14
damnum 15:9
dandy 14:11
day 8:5 27:3 40:10
days 8:12
dead 19:18
deal 27:22 28:15 33:20 35:7 42:12 48:2,18 49:5 50:21,24 51:11
death 5:10,11,21 6:3,7 20:21,21 20:23,23 21:16 22:23 58:14,15 58:21
decades 40:22
decide 33:6 34:17 45:16 48:3 49:4,8 50:15,21 53:12 53:17,20
decided 14:9 19:5 34:19 40:23 42:20
deciding 13:8,9 26:16
decision 4:18,21 5:2 6:5 35:4
decisionmaker 29:21,21,24
decisions 33:18 40:2
decree 22:16
defective 12:19 13:2,3
defend 48:7
defendant 3:15 3:19 4:10,12 6:5,9 7:23 9:9 12:20 13:4 14:7 14:8 16:12 17:1 17:22 20:10,24 21:8,9,11,13 21:20 23:2,4 25:9,11 26:24 30:17 37:16,24 43:20,21 45:6 47:21 48:1,6 49:5 54:20,24 55:2 59:16
defendant's 4:23 24:12 49:13,14
Defender 1:21
defense 18:24 30:14 38:21 39:13,17 40:6 48:8 53:14 54:4 54:6,9,9,18 55:5,7,25 56:1 56:2,5,8,9,15 56:19
deference 34:7

34:11,13,14,18 35:3
deferential 34:15 40:1
deficiency 6:24 7:8,23,24 11:20
deficient 3:12 4:14 9:4 10:9 11:22 12:16 14:20 30:9,10 30:11 39:5,7 58:9 59:21
define 7:14,21
definitely 53:18
definitively 14:18
demand 4:20
demonstrate 5:24
demonstrates 57:12
demonstrating 4:16
deny 54:11
Department 1:18
depend 37:3 46:20 48:6,7
depending 10:7 26:2
depends 26:11
deprivation 4:10
deprive 13:13 25:18
deserve 23:19
deserved 23:10 23:13,14
desire 24:12
details 29:25
determination 8:3 11:23 48:11 48:21,23 51:24
determine 4:4
determined 23:13
Detroit 1:21
dice 50:12
die 16:13
died 34:2
difference 8:13 9:15,19,19 11:2 13:7,11,12,13 45:8
different 7:18,19 11:5 12:14,25 15:2 21:13,16 21:17 23:6 24:2 24:7 28:22 42:11,13,23 43:2 50:7
difficult 16:25 17:4 20:14 39:25
difficulties 20:13
direction 44:23
disagree 23:8 31:18 40:20
disaster 39:20
discovered 30:18
discretion 8:15 16:18 27:23 32:8,14 35:10 35:18,19 41:25 42:15 44:13,14 58:6
discretionary 9:14
discussing 20:9
discussions 40:6 40:14
dismiss 58:8
disposed 10:22 10:24
distinction 39:11
district 35:9
doing 21:11 42:19
dollars 51:13
double 58:12
doubly 34:15
doubt 6:25 7:25 13:16 15:6 23:12
draw 39:11
drawn 11:18
due 58:16
D.C 1:8,18

E

E 2:1 3:1,1
earlier 35:8 47:10
early 30:23
easier 9:16 21:5
effect 10:10 16:14 21:10
effective 3:13,23 7:6 11:1 14:23 14:24 15:5 24:25 26:6 27:19 49:17,19
effectiveness 49:22
egg 17:24
eggs 15:21
Either 38:6
else's 33:11
enforce 58:11
engage 34:23
enormous 22:17
ensue 21:13
ensuring 3:14
enter 6:13 12:20 26:6 60:3,3
entered 12:21 59:12
entire 52:14
entirely 28:17 38:7
entitled 9:12 14:23,24 15:4 23:2 29:7
entitles 24:3,4
entitling 24:24
entry 13:9 14:1
erases 53:6
error 8:9,10 11:20 16:1 23:7
error-free 16:8 57:7 58:1
ESQ 1:15,17,21 2:3,6,10,13
essentially 16:12
established 6:14
establishes 11:4
evade 44:1
evaluate 29:9 30:4,10 60:8
evaluated 30:5
evaluating 14:25
evidence 3:25 11:15 50:18,23 53:13
ex 53:17
exact 42:3
exactly 8:11 13:22 16:3 28:24 42:3 59:1
example 5:2 8:12 11:6 17:10,22 20:24 23:19 26:17 43:2
exceedingly 57:10
execute 34:3
executed 19:14
existed 47:16
existing 58:19
exists 44:4
expect 28:23
expected 30:2
explain 13:2 26:21
extend 32:18
extent 16:23
extra 28:10
extraordinary 31:23

F

faced 25:24,24
facile 12:7
fact 16:11 33:7 34:6 43:3 49:8 58:1 59:20
factfinder 7:24
facts 5:11 20:14 43:22,22 56:11
factual 42:14,17 42:21 43:1,11 43:14 45:1
fact-specific 44:1 44:3
failed 9:13
failure 5:12,12
fair 11:11,14 23:11 38:8 44:10 46:11 47:23 52:8,12 52:20,25 59:5 59:24
fairness 4:6 11:9 11:17 13:14
fashioning 32:7,9
favor 58:17
favorable 39:14 39:15
feasible 39:10
federal 41:10 42:4 43:18 59:11,13
felon 31:8,12 32:2,6
Fifth 58:7
Finally 58:23
find 8:6 13:15 19:8 32:21 33:9 54:20 55:2
finding 23:12 33:13 34:11,13
fine 14:10 45:14
finish 27:16
fired 11:13
first 3:4,13,21 10:5,13 16:5,7 17:9 18:20

35:25 45:5 47:2 57:7,20
fit 3:22 44:25
five 29:6 30:19 57:19
flood 40:22 41:5
flows 37:25 38:1
follow 41:2
following 52:5
forced 24:9
forget 30:3
fork 5:7,9 11:24
found 27:12 38:7 38:23 42:7 50:9
four 29:6 57:1,25
Fourth 58:5
frankly 24:14
freedom 37:21
frequently 11:4 16:5
Fretwell 5:1 6:5 14:17 22:22
frivolous 56:1
Frye 17:15
Frye's 43:6
full 23:11
fundamentally 11:10
further 18:1 59:7

G

G 3:1
game 9:1 10:1,14
gates 40:22 41:5
General 1:15,18
generis 15:19
Ginsburg 6:16 6:21 8:21 12:19 13:2,6,23 28:11 28:20,20 31:5 31:14,25 41:13 41:19,23 52:7 52:11 57:20
give 9:7 12:24 13:16 14:1 17:13 23:14 33:16 34:7,11 34:13,18 35:4 37:15 42:15 43:2 60:7
given 17:17 22:9 34:16 44:23
giving 13:10 44:9 47:4
go 11:6 13:25 14:10 16:25 17:2 23:25 32:11,19 37:17 38:24 39:18 41:8 45:2,12 48:3 50:14 52:21 58:9
goes 29:15 36:10 36:13 43:21 47:7
going 9:7 11:7,11 16:19 32:7 36:14 39:10,18 40:9,11,13,23 46:15,20 47:3 47:18,21,23,23 48:6,6,7,15,19 48:19,21,23 49:4 50:12 51:12,12,14 53:18,21 54:1 56:23 58:7,10
good 7:12 10:1 40:8 42:24 59:16,18 60:8 60:10
gotten 19:15,15 21:11 28:13
government 59:10
granted 41:14
great 39:17
grounds 34:18 35:2 47:13,15
guess 8:18 9:23 48:22
guidelines 32:4,5
guilt 7:25 8:3 9:16 12:18 15:7 35:21
guilty 3:15 4:23 11:23 12:10,11 13:13,15,16,18 14:24 16:24 19:10,16 23:12 23:24 26:20,23 27:3,12,14,14 37:25,25 38:7 38:23 50:9 53:8 53:9 58:25 60:3 60:4
gunshot 34:3
guy 33:24 47:3 53:17,22
guy's 39:16

H

habeas 6:9 16:9 16:10 27:10 39:1,2,25 52:15
handles 42:3
happen 56:22
happened 22:6 28:24 31:10 35:20
happens 26:3,12 30:24 36:7,15 46:20,20
happy 22:3
hard 39:10
harder 55:6,8
harm 7:3,15 9:19
harmful 22:11
head 33:25 34:5
hear 3:3
heard 20:10,11 20:11 30:2
hearing 11:19 12:14,15 26:23 51:5
hearings 3:24
heart 15:19
heinous 34:3
held 4:12 6:9 10:17,25 14:18 40:21 56:4
high 32:5 39:3
higher 9:9
Hill 10:25 12:23 40:22 42:20
hit 11:13 33:24 34:1 56:10
hoc 40:14
hold 26:19 45:11
holding 14:13 19:20 59:3
Honor 40:20 44:1 56:24
hoping 34:4 56:21
horrific 30:1
hours 8:25
hypothetical 9:3 19:22 20:9 21:4 21:6 22:6,20 32:16 44:2 46:15 55:7

I

identification 56:10
identifying 23:7
identity 54:19
ignore 30:8
ignores 57:23 58:1
Illinois 26:17
illusory 5:8
imaginary 19:17 19:19
imagine 37:16
impact 11:17 12:17
imperfect 29:10 29:11,12,13 37:10
implication 4:5
important 10:9 17:7
impose 40:16
imposing 35:22 59:14
impossible 39:21
imprisonment 28:10
improper 28:17
inaccurate 39:12
inadequate 22:15 23:19
includes 35:14
including 5:21 57:6
incompetent 28:7,9 51:4 55:18
inconceivable 21:16 53:20
inconsistent 25:20
incredible 30:17
incurred 24:17
individual 14:7,8
ineffective 3:18 4:9 6:10,17,19 6:22 8:6,21,22 9:22,24 10:4 12:8 18:13,14 20:1,5 28:12 30:25 32:25 33:2,11 34:20 35:5 43:8 45:7
ineffectiveness 33:19
information 17:9 30:13,14,15 47:11 57:24
infringing 16:17
initial 28:16 41:21
injuria 15:10

injury 5:15,17,17 15:12
innocence 35:21
inquire 59:15 60:6
inquiries 40:13
inquiry 59:7
instructive 19:23
intact 14:19
intend 56:10,16
intent 34:3
interaction 25:8
interesting 15:18
interim 30:19 57:24
intervening 29:5
interventions 28:15
intractable 4:15 58:7,12
investigation 30:23
invoke 13:24
invoking 4:24 11:6
issue 16:1 19:5 41:11 42:5,6 48:22 58:6
issuing 16:10

J

J 1:15 2:3,13 3:7 57:2
jail 8:5 19:16 50:12,14
Jay 1:17 2:6 18:4 18:5,8,25 19:21 20:18,22 21:5 21:23 22:3,18 23:8,21 24:23 26:4,15,18,22 27:5,9,18
jeopardy 58:12
job 10:2,3 21:8 21:11
JOHN 1:15 2:3 2:13 3:7 57:2
Jones 40:9
judge 8:13,16 9:5 17:3 28:17 29:14,16,17 30:12 31:5,5,10 31:15 32:6,8,11 32:13,19,19 35:9,17 36:9,10 36:11,12,13,13 36:18,25 37:4 37:17,20 41:16 41:25 44:14 45:13,14,16,21 47:9,13,17,18 47:25 48:2,20 49:3,4,10,20 50:1,3,15,20 51:2,4 60:5
judges 54:18,19 55:1 59:14,14
judging 37:13
Juries 53:12,19
jurisprudence 26:11 40:21
juror 56:16
jury 5:3,3 13:14 13:25 23:11 27:13 38:7 53:17 56:12
justice 1:18 3:3,9 3:20 4:2,17,22 5:10,20 6:16,20 7:2,12,17 8:2 8:18,21 9:21 10:12,20 11:8 11:21 12:2,6,19 13:2,6,11,21 13:23 14:3,15 14:22 15:3,8,12 15:17,24 16:21 18:3,8,20 19:2 19:24 20:6,19 20:21 21:1,15 21:25 22:5,18 23:8,9,17,21 24:23 25:3,6,15 25:17,24 26:1,9 26:17,18,25 27:6,7,7,17,24 27:25 28:4,11 28:19,20,25 29:3,14,23 30:7 30:16,21 31:5 31:14,25 32:15 32:16,22 33:15 33:15 34:5,10 35:8,13,18 36:1 36:5,10,19,25 37:7,12,20,23 38:5,9,14,19 39:7,9 40:3 41:1,5,8,13,19 41:23 42:9,21 43:1,10,19 44:5 44:12 45:2,4,11 45:16,25 46:2,7 46:10,13,14,17 46:23 47:1,2,7 47:8,20 48:9,13 48:14,17 49:3 49:13,21 50:1,6 50:18,20,23 51:8 52:7,9,11 52:19,24 53:2,4 53:10,16 54:3,6 54:11,14,16,23 55:10,23 56:6 56:12,25 57:14 57:20,23 58:15 59:4,9 60:1,11
Justice's 47:9 48:14,24
justifies 42:22

K

Kagan 3:20 4:2 7:2,12,17 8:2 8:18 14:3 24:23 25:3,6,15,25 26:1,9,17 27:7 41:1,5,8 42:9
Kali 17:11 58:25
keep 4:20
Kennedy 5:10,20 11:21 12:2,6 14:15 15:8,12 26:25 27:6,7 29:14,23 30:7 40:3 48:13 52:9 52:19,24 53:2 59:4,9 60:1
key 51:21
kill 33:24 56:17
Kimmelman 3:23 4:3 9:18 14:14
kind 4:21 11:14 54:17
knew 17:18
know 10:1,1 27:8 29:25 33:5 39:9 43:14 47:21 48:15,19,23 49:4 50:2 55:4 60:2,5
knowledge 19:6 29:18
knows 9:5 16:23 31:6,6,7,10 40:9

L

lack 18:17 42:9
Lafler 1:3 3:4
language 7:22 19:6 25:10
Lansing 1:15
large 48:5
larger 48:7
laughter 38:11 38:13 46:9 50:25
law 11:11 27:19 35:17 36:17 37:5
lawyer 21:2,7,10 22:12 23:5,6,19 23:22,24 24:1 24:25,25 25:13 25:19 26:11 59:21
lawyer's 49:14
leads 5:12
learn 17:9
learned 17:10,15 29:18 30:8 36:2 47:11 57:24
leave 44:13
led 8:23 11:23 22:7,16 23:24
legal 8:9 10:13 13:19 16:1 23:7 39:12
legally 9:12 14:21 49:11 55:19 56:13,22
legitimate 37:5
length 51:8
lesser 23:3 33:23 52:6 54:2 55:20
letters 49:20 51:2
let's 9:2 16:4 20:21 23:17,25 29:15 31:6 39:16,18 45:2 50:8 51:10,22 53:18
life 22:24
light 29:4
likes 9:9
limited 3:13
line-up 12:15
literally 56:1,7
little 12:7 16:21 50:25 59:3
live 24:9
local 9:4,6,9
long 7:4,19 14:5

14:9,18
longer 8:5,23
look 10:6 11:19 12:17 19:24,25 20:19,19,22 22:20 23:1 24:18 27:10 33:3 50:23 52:16,17
looked 32:24
looking 44:12 50:17,18
looks 48:11 50:3
lose 53:18
lost 6:11
lot 42:14 55:8 57:8
lousy 9:25 10:8
low 33:25
lower 4:3 33:18 42:16 44:24

M

M 1:17 2:6 18:5
making 20:8 48:10 49:18
man 23:10 28:18 31:11
mandatory 22:7
manner 41:12
math 53:9
matter 1:11 30:17 40:4 53:12 60:14
McClain 35:7
McLean 51:3 53:24
McMahon 40:24
mean 6:17 7:21 10:3 15:17 16:22 18:22 19:13 23:20 30:16 33:5,8 36:3 42:2,10,23 43:1,6 44:23 45:23 46:21 47:25 48:12 49:12 51:6,21 53:14,25 55:25 56:5,10 58:11
meaning 33:1
means 18:16 21:10
meet 7:7
memories 16:13
mentioned 58:5
mere 3:16,21
met 39:4 55:2
metaphor 29:17
Michigan 1:16 1:22 34:23 35:17 36:17 47:17
mill 31:23,24
million 51:13
mind 12:10 30:21
mine 38:10
minimum 24:18
minute 6:2
minutes 57:1
misbehavior 22:12
misgauged 11:10
misidentification 54:25
mistaken 39:13 54:19 56:9
mitigate 58:17
modicum 44:8
moment 33:10
Monday 1:9
months 28:10,14 41:16 51:12
morning 3:4,12 4:9
motions 54:17
move 16:13
moved 21:3
muck 45:24
Mundy 17:11 58:25
murder 21:9,14 33:6
murders 30:19 30:19
myriad 40:6

N

N 2:1,1 3:1
narrow 22:25
narrowly 44:21 44:24
natural 16:14
nature 12:9
need 24:11
negotiate 34:4
negotiations 14:6 27:2 40:5 40:14
never 14:4 20:4 20:10,11 21:1,3 24:4 47:5 53:11 54:13 55:15,17 55:17,18 56:11
new 16:6 20:3 24:3 36:7,19,22 38:8,16,25 43:7 44:9 57:10,11
Newman 1:21 2:10 28:1,2,4 28:19 29:2,9,19 30:4,9,20,24 31:13,18 32:3 32:21 34:9,12 35:12,16,23 36:3,6,8,16,21 37:3,9,19,22 38:2,12,18 39:1 39:24 40:20 41:3,7,9,18,22 42:1,18,25 43:5 43:13,25 44:11 44:18 45:10,15 46:5,16,19,25 47:6,15 48:5,10 48:16 49:1,7,16 49:25 50:3,17 50:22 51:1,19 52:10,13,21 53:1,5,14,23 54:5,8,13,15 54:22 55:4,14 56:4,7,19
nine 13:15
noncapital 21:19
non-habeas 40:1
normal 17:2
notes 8:21
notoriously 10:3
nub 47:12
number 24:11
numerous 29:20

O

O 2:1 3:1
objection 6:6 22:24,24
obtain 24:11
obvious 4:4 22:14
obviously 3:25 6:8 9:16
occasion 23:18
occurred 16:2
occurs 25:18,20
October 1:9
offense 32:5,6 52:4,5 54:2 55:20
offer 16:19 17:1 17:24 19:12,15 20:10 21:4,19 22:16 24:6,10 24:18 27:23 32:18 36:12,13 38:22 41:15,21 51:17 58:8 60:2
offered 4:19 30:22 39:15
offering 40:8
offers 14:25 40:17 51:11 59:15
oh 14:9 36:9 38:24 53:10
okay 19:16 20:12 24:8 34:2,2 36:12,25 37:8,9 38:12 43:3,4,11 43:11,12,14 46:4,25 47:1 50:8
once 4:19 6:14 9:11 16:20 27:23
open 45:12
opened 41:6
opening 5:13
opinion 27:1 33:10
opportunity 6:6 6:11
opposed 8:24
option 36:9
oral 1:11 2:2,5,9 3:7 18:5 28:2
order 5:23 16:6,7 19:25 20:3,3 24:5 32:17 37:14
ordered 43:7,17 43:18
ordering 19:11
ordinary 31:22
original 47:16
outcome 3:16,21 7:15,17,18,19 7:21 9:19 20:4 22:25 26:3,13 26:14
outcomes 23:1
outrageous 36:14

P

P 3:1
Padilla 10:25 12:24 39:3
page 2:2 27:13
parameters 36:4
part 7:3 10:13 21:19 25:2 48:5 48:7
particular 6:4 24:5 25:24
parties 15:25
penalty 5:21 6:3 6:8 58:15
people 13:15 23:12,18 32:12 40:23 42:11 50:6,7,10,13 57:25 59:1
percent 10:21,23 19:10 25:17,20 45:13 50:8
perfect 22:7 31:4 38:6,9,10
perfectly 36:22 38:2,3 46:11
performance 9:4 16:16 29:1,8 30:11,12 39:5,8 43:23 44:6,16 57:16
period 18:24
permit 55:1
permits 33:16
person 7:4 8:4 14:9 24:3,4 44:10 50:9 56:14
person's 19:14
perspective 59:6
petitioner 1:4,16 1:20 2:4,8,14 3:8 18:7 27:10 57:3
Petitioner's 18:10
phase 9:16 24:24 25:16 26:2,2,3 26:10,12,20
picked 17:16
place 16:20 35:25 38:17 58:2
plea 3:12 4:12,15 4:19,23 5:7 7:6 10:18 11:2,3 12:13,20 13:3,4 14:5,10,25 16:19 17:14,17 17:18,23 19:15 20:25 21:3,19 22:8 23:25 24:10,24 25:16 25:18 26:6,23 27:1,3 29:1 30:22 31:6,7,11 31:15,21,22 32:13,20 35:11 36:15 37:15,24 38:22 39:15 40:5,16,25 41:16 43:7,20 45:8,12,13,17 47:3,10,14,22 49:10 51:3,6,11 51:15,17,19 52:1 53:8,9 54:21 55:3,9,13 55:22 57:16,21 58:11 59:12,15 59:20 60:2,3,4
plead 11:23 12:10 13:13,16 13:18 14:24 19:10 37:24,25 58:8
pleaded 27:14
pleading 26:20 26:23 54:24
please 3:10 18:9 28:5
pled 19:16
pocket 16:24
point 4:8 12:7 13:22 15:22 17:8 30:10,11 30:23 55:24 57:5 58:13,23
pointed 57:20
points 3:11 22:18
policy 60:10
position 14:12,16 14:22 15:25 26:7 53:3 55:8 55:21 56:23 59:4
possession 31:8 31:12 32:2,6
possibility 41:20 44:4 53:7,11,15
possible 4:14 39:16
post 40:14
post-conviction 51:5
powers 17:7 58:6
practice 10:7 31:20 59:17,18
practiced 31:20
precedent 58:19
precise 25:6
predicated 51:17 51:20
predilection 9:6
prejudice 3:16 4:4,5 7:8 8:6 15:16 19:14,18 22:17 39:6 48:15,17 49:24
prejudiced 18:15 26:7
prejudicial 21:9
preliminary 11:19 12:14
prescind 29:18 30:3
prescribed 59:2
present 42:13
presented 52:14 54:9,9
press 3:12 4:8 9:8
presumably 48:1
presumes 29:20
pretty 30:16 46:1
previous 45:19
price 31:2
principle 20:14 20:16,18 22:2
prior 37:1,7
prison 7:4,5,18 22:8,10,13
private 25:13 59:22
probability 21:12 23:6 28:21,23
probably 56:16
problem 16:17 19:11 32:15,16 32:23 57:18 58:12 59:19,21 59:23,23
problems 4:15 58:7,13
procedural 4:11 5:6
proceed 13:8,9 36:17
proceeding 4:6 11:18 18:18 20:2,3 24:4 38:8 58:23
proceedings 3:15 3:22,25 7:1 18:11 30:6 51:23 52:14 55:16
process 5:25 6:9 7:22 9:20,20 10:13 11:9 14:19 17:2 25:19 27:3 58:16
produce 24:2
produced 18:11 18:18 20:2,24 23:2
professional 10:7
prong 6:24 10:5
proper 59:10
properly 12:21 19:7
proposing 40:18 47:13
prosecution 19:11 24:9,15 24:17 25:11 32:17 37:14 51:20
prosecutions 18:23
prosecution's 27:23 39:19
prosecutor 14:6 16:23 17:10,17 17:20 24:8 28:15 30:13 33:23 40:7,10 40:12 41:17,20 41:23,25 51:11 51:18 58:2
prosecutorial 58:6
prosecutor's 16:18 24:6 29:5 57:21
prove 5:23 15:15 47:3 56:2
proven 54:20
provide 14:8
provided 8:20 9:24 14:5 51:4
proving 55:3
punishment 14:21

purpose 38:4
purposes 6:21
put 15:25 17:22 29:22 32:12 46:17 47:11 55:21 56:1 58:18 59:20
puts 44:20
putting 58:3

Q

qualifications 19:3
qualifies 13:3 40:2
question 5:13 6:24 8:4 9:12 12:3,3 15:9 34:13,15 35:5 42:10,12 43:16 44:2 46:24 47:9 48:14,24 49:8 49:22,24 51:7 55:15 57:18
questions 18:1 59:8
quite 8:9

R

R 1:21 2:10 3:1 28:2
raise 6:6
raised 35:1
range 31:9 32:1
reached 35:3
read 33:9,18
real 54:9
reality 52:16
really 5:1,7 6:12 8:15 9:11,15 10:19 19:13 20:9 33:24 34:1 34:2 40:10 47:12 52:2 59:6
reason 7:11,13 28:23 37:5 38:4 53:21 55:22
reasonable 6:1 7:24 13:16 21:12 23:5,12 28:21,23 32:18 33:22 56:16
reasons 33:16 37:3 45:18 47:17
REBUTTAL 2:12 57:2
receive 26:5
received 28:7
recognize 25:15 42:13
recommend 23:24 44:5
recommendation 35:16 47:19
recommending 44:6
record 28:22 33:10 35:6 50:3 50:19 56:20 58:18 59:20
red 27:13
refer 6:4
refused 14:7
regain 6:11
regarding 3:12 16:1
reinstate 27:22 36:12 45:19 51:16
reinstitute 22:16
reject 4:19 37:21 45:17 47:10,14
rejected 51:15 57:16
rejects 37:23 58:8
relatively 51:10
releasing 16:12
relevant 14:21
reliability 3:14 3:22 6:25 7:21 9:20 11:9 14:18 15:7 58:22
reliable 4:1 18:11,12 21:14 24:16,16
relief 12:22 28:25
relieving 51:17 51:20
remanded 4:3
remarks 5:14
remedial 22:15
remedied 42:8
remedies 16:4 42:1,11,24 43:2
remedy 4:14 5:15,18 6:1,12 13:1 15:24 19:25 29:11,11 29:12,13,15 32:7,9,9 36:23 37:13 38:3 41:13,24,24 42:10,12,16,23 43:8,15,16,17 43:18,22,23 44:6,8,8,9,15 44:17,19,20,25 45:23 47:4 51:16 57:9
removes 41:19
repeat 19:12
represent 31:19
representation 27:20
requirements 7:7
requires 18:25 28:21
requiring 18:23 21:18 58:18
reserve 18:2
resolve 27:9 34:7
respect 6:3 35:21 52:15 60:7
respectfully 12:13 60:9
respecting 7:25
respects 17:9
Respondent 1:22 2:11 7:10 28:3
Respondent's 24:22
rests 24:10
result 9:12 24:2 28:8,22 35:21 37:10 57:17
resulted 22:21 22:22
results 26:13,14 27:4
retained 32:14
retains 35:10
revealing 24:21
review 34:16 39:25 40:1
reviewing 18:17 20:1
re-imposed 57:17
re-institute 37:15
Richardson 40:24
right 3:14,23 4:11,12,18,20 4:21,24 5:6,7,8 6:4,12 8:10 9:13 10:18 11:1 11:5,6,7,24 12:1,24 13:24 15:3 16:3 17:1 19:18 20:22 21:25 25:4,22 26:5,11,13 32:21 35:11 37:2,19 38:15 41:2,3 43:10 46:16,19 47:6,7 49:16 52:9,14 53:22 56:13 57:8,22 58:16 58:17 60:5
rights 4:24 13:24 14:2
rip 39:18
risk 17:21 24:14 58:2,4
road 5:7 11:25 53:7
ROBERTS 3:3 16:21 18:3 27:17,25 35:8 35:13,18 36:1 39:7 47:20 48:9 49:3,13,21 50:1 50:6,20,23 53:10,16 55:23 56:6,12,25 60:11
roll 50:12
roughly 5:11
rule 11:18 21:17 21:18 39:21 40:15 41:2 59:11 60:10
rules 22:7 59:11 59:13,13
run 31:23,24
running 17:12 56:21

S

S 2:1 3:1
sacred 16:18,21
saying 5:16,19 5:22 6:1 22:16 33:4,6 37:14 40:25 41:20 51:2 52:19,21 52:24 53:5 56:7 56:16 57:11
says 8:16 9:17 27:13 36:6,14

37:16 39:17 40:8,13 57:8
Scalia 9:21 10:12 13:11,21 14:22 15:3 23:8 26:18 36:5,10,19,25 37:7 38:5 42:21 43:1,10 45:4 46:2,7,10,14 46:17 48:17 53:4
score 32:4
Scott 26:17
scot-free 47:23
screaming 17:12
second 3:18 4:8 7:3 10:19 16:7 16:16 57:7,23 58:13
see 12:17 17:4 19:13 32:25 56:15
seen 19:4 26:9
send 36:11
sense 16:6 42:4 44:9,10 47:4 57:8
sentence 6:7,13 8:24 9:10 10:3 14:19 16:11 18:10,13,19 20:4,23,23 21:19 22:21,21 22:24 23:2,3,10 23:13,14,18 24:5 27:12,16 27:18,20 32:1 35:14,15,16,22 39:16 52:2 58:21,23 59:1,3 59:14
sentenced 3:16 27:19
sentences 8:14
sentencing 8:2,3 8:24 9:3,11 10:10 22:7 23:5 23:23 24:17 27:20 31:8 32:14 35:12 47:19
separate 20:13 52:15
separation 17:7 58:6
serious 32:4
seriously 58:14
serving 28:9
set 13:25 20:20 33:12 36:4 46:11,15
severity 6:13 14:20
sexual 17:22 58:3
shakes 20:1
shaking 34:5
shift 9:11
shoot 17:11 56:14
shooting 34:1 54:12 58:25
shootings 29:7
short 51:10
shot 39:17 56:17 57:25
shots 11:13
show 4:10 18:14 18:17 20:24 21:6,9,12 23:22 24:1,1 39:4,10 48:15
showing 55:8
shows 21:1
side 5:9 49:23
sides 33:5,5 57:6
simple 8:9 51:10
simply 9:13 19:11 24:20 39:13 40:19 57:17
sitting 7:4,5,18 8:4
situation 5:1 8:1 12:25 15:21 25:24 39:22 43:3,19,24 44:13,15,25 58:14,16
Sixth 4:7,25 5:23 8:17 9:10 10:11 14:11 15:6,15 18:21,22,25 19:3,9 24:3,4 25:21 26:10,13 32:10 33:4,12 34:17,23 35:1 42:7 44:19,21 52:17
skipped 11:21
sleeping 21:2
slightly 15:1
soften 40:11
Solicitor 1:15,17
solve 59:23
solved 59:19
somebody 24:25 25:19
somewhat 33:3
sooner 27:14
sorry 6:13 7:23 15:11 36:9 41:7 54:5
sort 34:15
Sotomayor 4:17 4:22 10:20 11:8 33:15 34:10 46:23 47:1,7 54:3,6,11,14 54:16,23 55:10
sought 47:5
Sounds 7:12
spare 24:13
sparse 16:14
speak 22:12
specific 16:16 19:5 20:3 22:16 29:1,7 43:23 44:6,16 57:15
specifically 7:15 7:22 35:1 56:20
specificity 40:18
sports 9:6,9
stage 7:7 12:14 15:5 25:10,19 27:2 40:25 55:16
stand 17:23 58:4
standard 3:17
standards 10:7
stands 21:7 51:22
start 57:5
state 14:4,7 25:8 30:25 31:2 33:2 33:13 34:7,17 34:19 35:4,6 37:5,39:25 41:10,15 42:5 43:7,15,17 56:2 56:4 59:13
stated 29:19 40:17
statement 47:2
States 1:1,12,19 2:7 18:6 59:10
step 11:22 55:15
stop 3:20 20:7
strange 57:10
strategic 40:2
strategy 23:7,22 23:24,25 24:2 48:12 56:18,21
Strickland 3:16 6:22 7:8,16 8:16 9:17 10:6 15:14 18:16 19:24 24:21 28:21 29:10,11 34:16 39:2,5 40:21 42:20 48:11 51:22 57:9,13 58:20
strikes 20:13
strong 16:22
stuff 17:4
submit 12:13 60:9
submitted 60:12 60:14
subsequent 10:10
substantial 42:15
substantive 4:11 5:5
suggest 8:20,25 42:11
suggested 45:4 46:2,6
suggestion 20:8 38:9,15 46:11 57:15
sui 15:19
supporting 1:19 2:8 18:7
Suppose 5:10 12:19
supposed 29:15 33:8 47:25 48:3 50:2,15
suppression 3:24 12:15
Supreme 1:1,12
sure 22:19 27:17 43:15 55:24
system 13:19 25:18 45:25

T

T 2:1,1
tailor 44:25
tailored 44:21
take 8:2 14:3 32:8,16 35:19 35:23 36:2 47:3

50:7,10,16,21 50:24 51:5,12 52:1 58:4,14
taken 16:20 17:18 19:6 35:24 48:2 49:22 54:21 55:3,9 58:2,2
takes 57:21
talk 6:2 11:8 16:4
talking 8:12 9:15 25:7 49:24
talks 18:22 52:18
team 9:6,9
tell 17:1 20:15 38:24
tells 52:22
ten 30:19
tendencies 9:14
term 18:16
terribly 16:25 17:4 39:13
test 6:23 7:3 13:14 27:8,9 28:21
testified 17:17
testimony 49:9 50:5
tests 11:5
text 18:22
Thank 3:9 18:3 27:24,25 28:4 56:24,25 57:4 60:11
theoretically 15:18
theory 60:6
thing 8:7 10:9 13:19 38:22 42:19 56:22
things 8:14,16 25:6 30:10
think 5:14 10:13 11:22 12:4 16:9 16:22 19:17,21 19:23 20:18 21:5,16,24 24:21 25:1,23 26:15 28:11,17 33:21,23 36:21 36:21 37:9 39:10,21,24 40:4,16 42:22 44:3,19 46:1,3 46:4,17 47:2,8 48:13,24 49:1 51:8 57:5 59:10 59:12
thinking 8:13 11:12 40:8
thinks 40:11
third 4:14 15:22 58:1
thought 6:18 7:2 15:19 27:16 55:10
three 3:11 7:4,18 39:16 40:21 57:25
throw 45:5
tick 57:19
time 18:2 24:7,8 27:23 28:10 29:5 30:5 32:18 45:14 53:18
times 7:4,19 19:23 25:4 29:20
today 43:6
told 21:3 49:10 49:10 51:4 52:3 53:24 55:12 56:21
tough 33:9
translating 33:21
trial 4:24 8:15 9:4,14 10:10 11:6,7,11,12 11:14,17,19 12:25 13:14,25 14:10 16:6,7,8 16:16,20 17:20 21:8,10 22:7 23:11,25 24:13 29:18 30:2,8 31:10 34:19,24 35:9,22 36:2,19 36:22,24 37:1,7 38:6,8,16,16 38:25 39:15,18 39:19 43:7,21 44:9,10,14 45:20 47:11,24 48:20 49:7,9,9 51:3,9,10,12 52:3,5,8,16,20 52:22,25 53:6,9 54:1,4,7,10,14 54:18,24 55:1 55:17,18,19 56:23 57:7,7,10 57:11,17 58:1,9 59:5,14,25
tried 17:23 45:22 51:15
true 8:7,11 28:19 32:1 48:3 53:23 56:14
truly 17:24
try 9:2 51:13,15 51:18 58:11
trying 13:23 20:12 22:1 29:16 33:19 35:7 42:11 45:3 46:2 51:21 59:24
turn 13:4 37:4
turned 43:20
turns 36:6 37:1 39:19 43:20
two 16:4 17:8 22:18 25:6 28:14 33:1 38:17 43:5 51:2 51:25
two-part 6:23
typically 32:3 57:9

U

unanimity 41:4,9 41:13 42:2,4,10
unconstitution... 31:1
uncontroverted 28:6,8
undeniably 57:22
underlying 5:5 48:12
understand 8:19 20:7 43:16 49:22
understood 15:22 55:24
unfair 16:23 23:10,14 52:20 52:21,24 53:5 59:3,5,24
unfairness 22:17 51:23 52:13 53:6
uniform 41:24
United 1:1,12,19 2:7 18:6 59:10
unreliability 5:25 51:23,24
unscramble 15:21
unscrambled 17:25
unwind 29:16
unworkable 40:19
use 6:10 24:6 47:13

V

v 1:5 3:4 26:17 40:24
vacating 16:10
vacation 21:3
VALERIE 1:21 2:10 28:2
valid 37:1 55:5,7
variation 42:14 42:17,22
variety 45:18 47:17
vary 42:1
vehicle 6:10
verdict 16:24 21:13 39:14
versus 11:6
victim 24:13 58:3
view 33:22
viewing 33:17
violates 17:6
violation 4:7 5:15 5:16,17,23,24 6:15,17 9:10 10:11 15:6,9,15 17:16 31:4 42:8 43:9 44:17,22 57:13 58:20
violations 8:17

W

Wade 14:14
waist 11:13 56:15,17
Wait 38:5
waived 21:20
waiving 11:5
walked 40:8
want 20:6,6,15 22:1,19 27:1,8 28:25 39:22 44:1 50:11,13 51:2 53:19 55:12,24 57:11 58:13,24
wanted 4:8 33:24 51:5
wants 17:2 27:22

Washington 1:8 1:18
wasn't 26:7 33:18 54:8
waste 53:18
water 40:7
way 10:22,24 15:20 22:23 26:16 33:17 38:24 42:3,12 45:25 49:7 50:14
Weatherford 10:17
week 37:15
went 7:20 55:18 55:19
we're 12:3 25:14 37:10
we've 25:21 39:17
whatsoever 11:17
WILLIAM 1:17 2:6 18:5
willing 50:7,10 50:12
Wipe 30:21
wishes 27:14
withdraw 57:21
withdrawing 28:16
withdrawn 40:13 41:21
witnesses 16:13 24:13 39:19
woman 33:24
word 7:15
work 42:16 45:4 60:3
worry 20:16
worse 22:21
wouldn't 32:15 37:13 59:19
writ 16:10 41:14
write 27:1
writing 40:17
wrong 7:13 45:19 45:23 53:8 55:11
wrote 49:19 50:19 51:2

X

x 1:2,7

Y

yardstick 20:5
Yeah 36:10 37:7
years 8:25 16:11 19:16 22:8,9,10 22:13 24:19 31:21 38:17 39:16,20 42:6 58:21

Z

zero 44:10

1

10 8:25
10-209 1:5 3:4
10:03 1:13 3:2
100 28:9
11 59:11
11:04 60:13
12 23:11 38:7
134 28:10
135 31:9 32:1
14a 27:13
18 2:7

2

2 22:9
20 50:8
2011 1:9
24 8:25
24-karat 13:14
25 39:20
28 2:11

3

3 2:4
30 42:6
31 1:9

4

48 22:10,13

5

50 19:16 22:8 58:21
51 28:13,17 31:16 41:15
51-month 24:18
57 2:14

6

6 51:12
68 28:14,17 31:16

8

8 16:11 24:19
8-year-old 17:22 58:3
81 31:9 32:1
85 41:16

9

9 16:11
90 45:13
95 10:21,23 19:9
98 25:17,20